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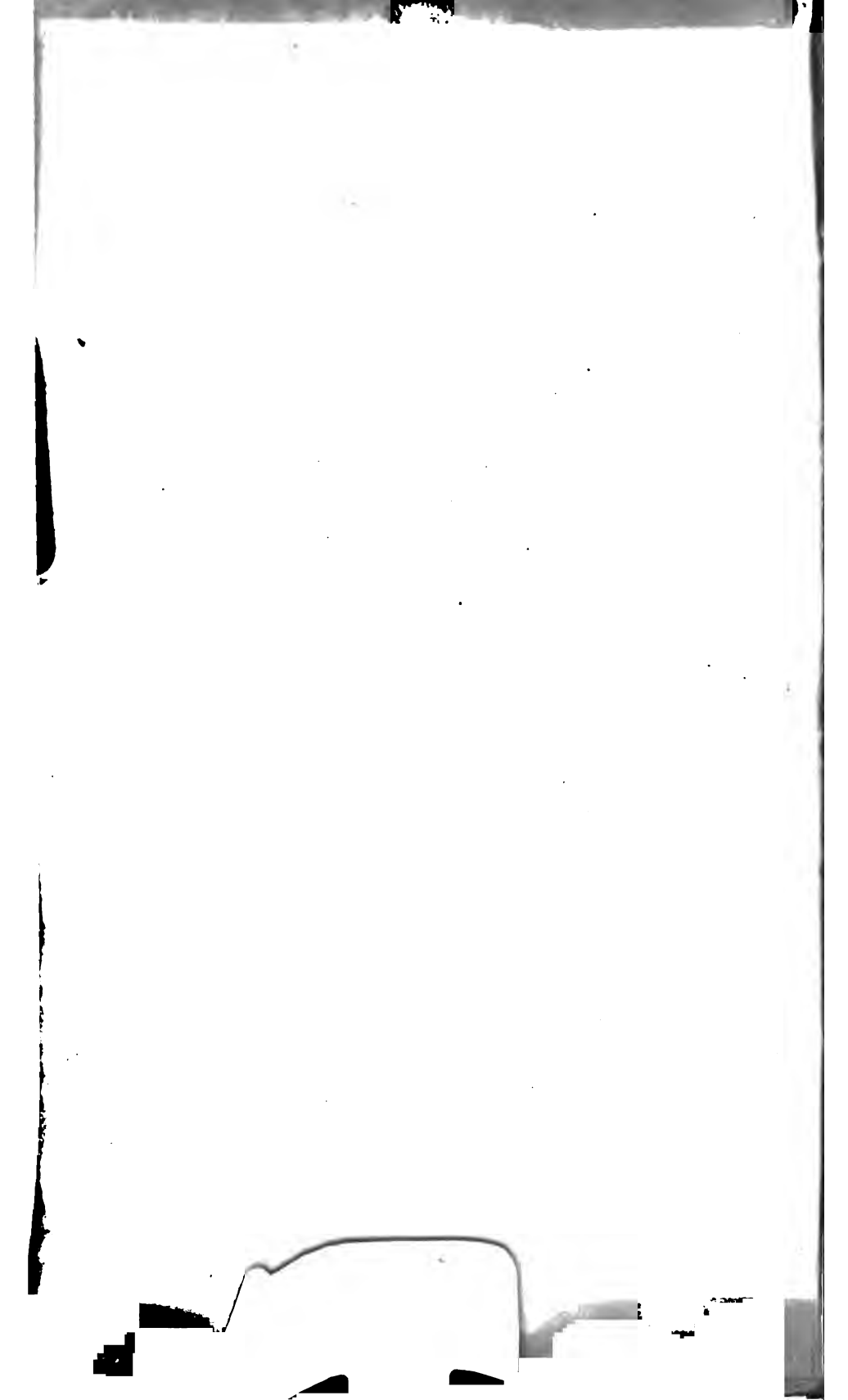
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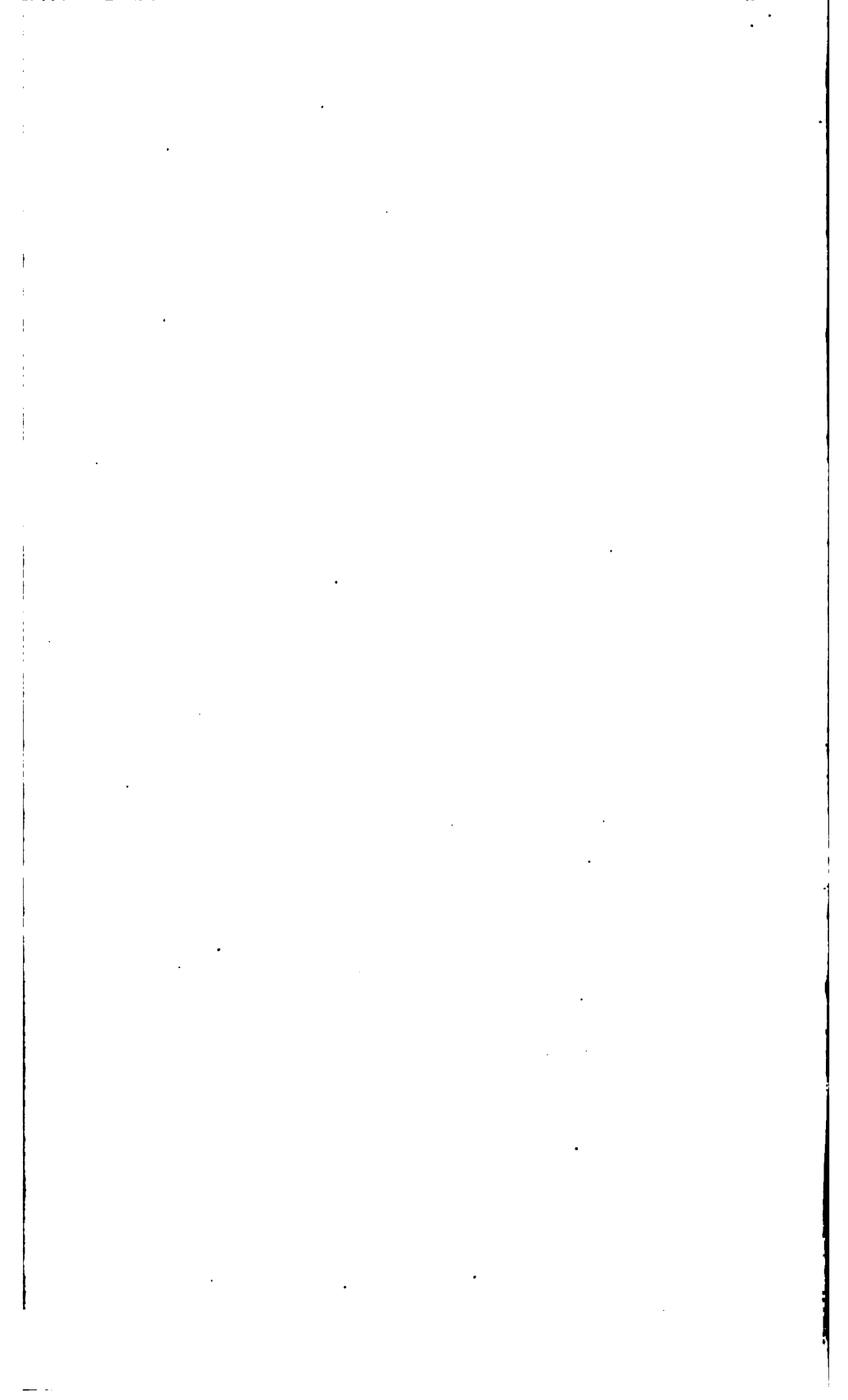
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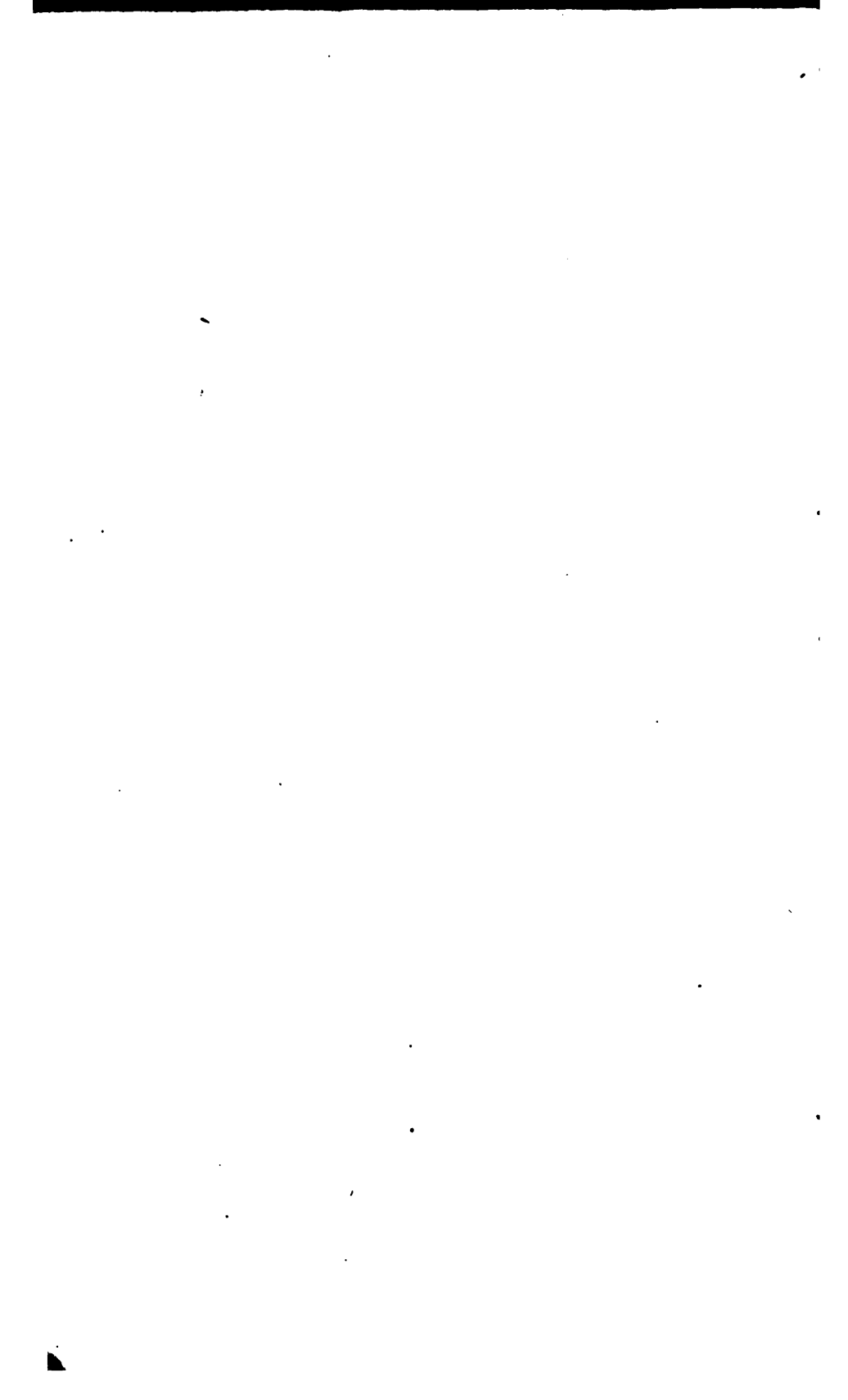
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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
(STATE) OF NEW YORK,
WITH
Copious Notes and References.

~~~~~  
BY GEORGE CAINES,  
COUNSELLOR AT LAW.  
~~~~~

THIRD EDITION,.

CAREFULLY REVISED AND CORRECTED,

WITH

ADDITIONAL NOTES EMBRACING THE MORE RECENT DECISIONS.

BY WILLIAM G. BANKS,
COUNSELLOR AT LAW.

IN THREE VOLUMES.

VOL. III.

BANKS & BROTHERS, LAW PUBLISHERS,
NEW YORK: No. 144 NASSAU STREET.
ALBANY: 475 BROADWAY.

1860.

57, 391

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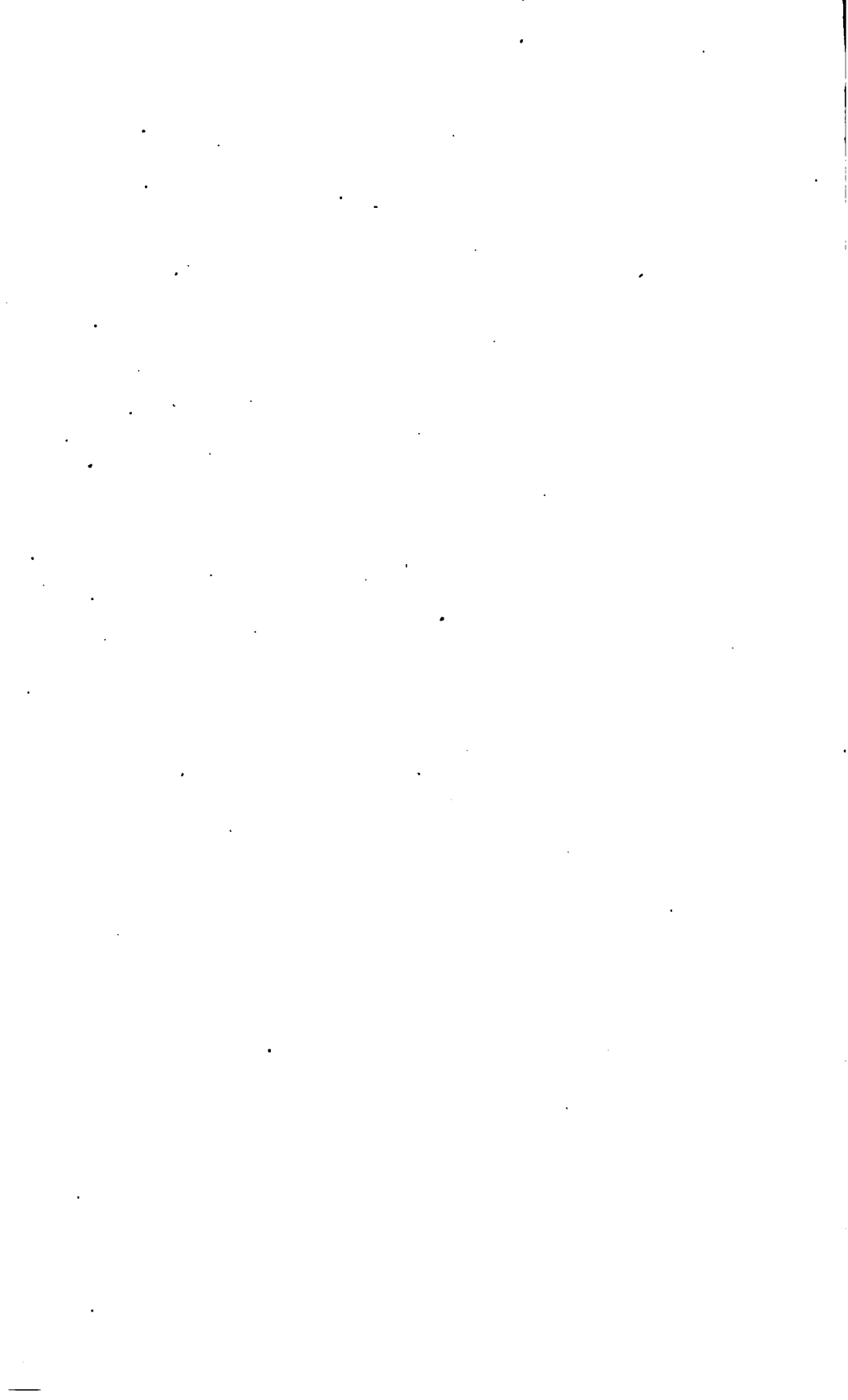
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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW YORK,

IN MAY TERM, IN THE TWENTY-NINTH YEAR OF OUR INDEPENDENCE

STEINBACH *against* OGDEN.

Under a count averring a loss by the barratry of the master, it is not incumbent on the assured to prove that the master was not the owner. It must, if relied on as a defence, be shown by the underwriter; a fraudulent sale and purchase by the master of a vessel, will not constitute such an ownership as to afford a defence to a claim for a loss by his barratry. A person contracting and dealing with a master who had purchased in his owner's vessel, in his capacity of master, may recover, under a count for barratry, a loss occasioned by the fraudulent conduct of such master.

THIS was an action upon a policy of insurance on the cargo of the sloop Britton, M'Culloch, master, on a voyage from Trinidad to New York, averring the loss to be from the barratry of the master. The subscription, interest, proof of loss and abandonment being admitted, a verdict was entered for the plaintiff, subject to the opinion of the court on the following case :

The vessel, owned by some merchants in the United States, sailed from Norfolk, in Virginia, on a voyage to Curracoa, under the command of M'Culloch ; who, instead of proceeding to his port of destination, ran away with her,

Steinbach v. Ogden.

and went to the island of St. Bartholomew, where he procured a fraudulent survey, under which he sold vessel and cargo at public auction, becoming himself the purchaser of the sloop, but without taking a bill of sale from the vendue-master, who merely gave an account of the sale, stating him to be the purchaser. From St. Bartholomew's he went to Trinidad, and there having, in the character of captain, contracted with the plaintiff's agent to take in a full freight, signed, as master, regular bills of lading for 244 hogsheads of sugar, and 189 quintals of braziletto, deliverable to the plaintiff in New York. After this he sailed from [*2] Curracoa to the Havanna, where he embezzled *the whole cargo, but wrote from thence, ordering insurance on the vessel, in his own name, as owner.

Colden, for the plaintiff. It will be contended, on the other side, that M'Culloch was owner as well as master, and, therefore, could not commit barratry. We, on the other hand, insist that, in judgment of law, he was master only; his fraudulent acts barratrous, and the defendant, consequently, liable. The plaintiff dealt with him as master; he acted in that capacity, both in making the agreement, and signing the bills of lading. This, to a shipper, is sufficient to show he was so, and throw the *onus* of proving the contrary on the defendant. *Ross v. Hunter*, 4 D. & E. 83. Against this may be urged the fact of the purchase at St. Bartholomew's. By this, it may be argued, he ceased to be captain, and became owner. The deduction, however, cannot be supported. He had only a fiduciary possession, and it is a settled principle, that a trustee cannot, even by a *bona fide* sale, acquire a title against his *cestui que trust*. *Berry v. Smith*, Vern. 60, 84. *A fortiori* when the sale is fraudulent. That the vessel was originally delivered to M'Culloch with the assent of the owners, will not alter the position. A tortious conversion cannot be rendered less so, because the property converted was voluntarily put into the hands of the wrong-doer by the proprietor. If a horse,

Steinbach v. Ogden.

hired for a day, be ridden away with, *animo furandi*, it is, notwithstanding the manual tradition of the owner, a felony. The purchase, then, by M'Culloch was for the benefit, and on account of his employers. Under the circumstances detailed in the case, a sale by him would not have passed any title, even to a third person. The reason is obvious; it is out of the general scope of a master's authority, and extreme necessity alone will warrant such a measure. *Elkins v. East India Company*, 1 P. Wms. 395; Abbott, 2, 4. Without such necessity, he cannot even create a *lien* upon the ship; and that it actually exists, it is the duty of the person, in whose favor the charge is imposed, to inquire. Moll. b. 2, c. 1, s. 10. *Bridgman's Case*, Hob. 12; 2 Marsh. 639; 2 Emer. 434, 441. But, allowing the vessel to have been M'Culloch's, still, as she was entirely freighted by the plaintiff, he was, *pro hac vice*, the owner. *Vallejo v. Wheeler*, Cowp. 147. It is not necessary that there should be any written contract or conveyance of the right in the ship for the voyage, to constitute a *pro hac vice* ownership. It is sufficient if the whole use and occupation of her is disposed of. *Nutt v. Bordieu*, 3 D. & E. 327; Abbott, 82, 148; *Ross v. Hunter*, 4 D. & E. 38, per Buller, J. .

**Pendleton and Harrison*, contra. The principal [*3] question is, who, in insurance, is to be deemed the owner? A general freighter of the whole ship cannot be considered so, when the captain is neither appointed by him, nor under his direction. There must be a control over the vessel to constitute an ownership. The plaintiff had none here, and with respect to all the world, except, perhaps, the original proprietors, M'Culloch, by the purchase, was the owner. His signing the bills of lading is no argument against this; the instrument is no more than a receipt for the goods shipped, and an engagement to carry them. Even a master-owner must thus contract for their conveyance, as there is, according to the established usage of trade, no other mode. *Ross v. Hunter* decided

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only that it was not necessary, in an action on a policy averring the loss to be by barratry, to prove, negatively, that the master was not owner. Nor is it requisite that he should be so, with all the rights of a legal title, to prevent a possibility of committing barratry. A color of title is enough, and M'Culloch's was impeachable only by his employers. As to third persons, it was valid, for the trustee is accountable to his *cestui que trust* alone. Indeed, as to land, the trustee is the legal owner. The authority from Vernon, therefore, does not apply. In *Parish v. Crawford*, 2 Str. 1251, the charterer was held not to be the owner, as the master was not of his appointment. The true criterion to determine the question of ownership is, by inquiring whether the control of the vessel has been parted with.

Riggs, in reply. It might, perhaps, be the safest rule with respect to barratry, to say that the assent which is to render the master's act not barratrous, ought to be the assent of the owner of the subject matter of insurance. For, no reason can be assigned why the consent of the owner of the ship to the conduct of the master, should take away from the proprietor of the cargo his remedy against the insurer. If, however, the title of M'Culloch is void against his owners on account of the fraud, the defendant cannot set it up against us.

THOMPSON, J, delivered the opinion of the Court. There is nothing in the case tending to show that the agent of Steinbach had any knowledge of the manner in which M'Culloch had conducted himself, or that he pretended to be owner of the vessel. All the circumstances stated, lead to the conclusion, that M'Culloch was considered by him as master only. He appeared in the character of master. The bill of lading was signed by him as master. The agreement respecting the freight was made with [*4] him as master, *as the witness understood. Under this statement I think the agent must be deemed

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prima facie at least, as dealing with him in the character of captain, and in no other capacity. In addition to which he is described in the policy as master, so that the underwriter contracted to indemnify the plaintiff against the barratry of this very man. It could not be incumbent on the assured to prove that the master was not the owner of the vessel. That would be calling on him to establish a negative. Proof of that fact, which is to operate as a discharge of the underwriter, lies on him; and if the master was not the owner, it is immaterial, as it respects the present question, who was. It is unnecessary, therefore, to examine or determine whether the general freighter is to be considered owner *pro hac vice*, or not; for, it being admitted that M'Culloch went to the Havanna for fraudulent purposes, the underwriter will be liable for the loss by barratry, unless the master was also owner. I am satisfied that M'Culloch could not be considered as the owner. There does not appear to have been any necessity for selling the vessel at St. Bartholomew's. Independent of this, however, it is expressly admitted that the sale and all the proceedings were fraudulent. Such sale cannot be made the basis for establishing any rights, or exonerating from any responsibilities. It must, in judgment of law, be deemed *ipso facto* void. The *onus* of proving that M'Culloch was owner lay on the defendant, and it cannot be tolerated in a court of justice, that a party should be permitted to derive any benefit or advantage from a transaction confessedly founded in fraud. The opinion of the court, therefore, is, that the plaintiff is entitled to recover as for a total loss.(a)

Judgment for the plaintiff.

(a) See *Kendrick v. Delafield*, 2 Caines's Rep. 67, and the notes to that case.

Tooker v. Bennett.

TOOKER against BENNETT and BROWER.

The release of one of two joint makers of a promissory note, under the act giving relief in cases of insolvency, is no discharge of the other.

ASSUMPSIT against the defendants as joint makers of a promissory note, from which Bennett had been exonerated under the act for giving relief in cases of insolvency. The defendants severed in their pleas, Bennett pleading his discharge, and Tooker giving notice that he should insist on that discharge, in bar of the suit against himself. The only question made, and now submitted without argument was, whether the discharge of the one would operate as a release to both?

[*5] *LIVINGSTON, J., delivered the opinion of the Court.

We perceive no difficulty in this case. By the proceedings under the "act for giving relief in cases of insolvency," Bennett is discharged from "all debts due at the time of the assignment of his estate, or contracted for before that time, though payable afterwards, and if in prison, from his imprisonment." Now as a joint debt is the debt of each, as well as of all the partners, he is absolved from such a demand as well as from every other. This is the case in England under the bankrupt laws; for, although the statutes on this subject say nothing of joint or separate debts, or of joint or separate commissions, all debts due by the bankrupt, whether jointly or separately, are equally discharged by a certificate, and that whether the commission be separate or joint. 3 P. Wms. 24; Sir. 995, 1157; 1 Atk. 67. It is reasonable this should be so, for the assignees of an insolvent partner have a right to possess themselves, not only of his separate estate, but also of his proportion of the joint property, if it be more than sufficient to pay the demands against the partnership. As all his estate, then, whether private or what he may have in

Tooker v. Bennett.

the common stock, passes by his assignment, what reason can be given why he should remain liable for a partnership more than any other demand? Bennett's discharge, therefore, is a good bar to this suit against him. But it can form no defence for Brower. The discharge of one partner under the insolvent act is no proof of the insolvency of his co-partners. As neither Brower's separate estate, nor his interest in the joint fund, passed by the assignment of Bennett, it would be difficult to say why he should be exonerated, by the inability of Bennett, from paying a debt, for which he was before liable to the extent of his whole fortune; or why the present plaintiff should be deprived, in this way, of the security which the law gave him, at the time of contracting the debt, against the person and property of Brower.

It is not possible that, by any reasoning, such injustice can be rendered even plausible.

In England, the certificate of one partner is declared by statute not to discharge or release the other, who shall remain liable, as if it had never been obtained.(a) No statute can be necessary to justify our going the length we now do. The obvious good sense and propriety of such a provision will justify our adopting the same rule, without waiting for legislative sanction.(b) Judgment must, therefore, be entered for the plaintiff against Brower, with costs, and in *favor of Bennett, who will, of course, [*6] be entitled to have his costs of the plaintiff. This will cause no inconsistency in the record; a joint suit was properly brought; and it will appear by the record that

(a) Where the defendants sever in their pleas, and the plea of one is a discharge under a bankrupt or insolvent law, the proper course is to enter a *nolle prosequi* as to him, and go on against the other. *Noke & Chiswell v. Ingham*, 1 Wils. 89.

(b) If two defendants be taken on a joint *ca. sa.* and one be subsequently discharged under an insolvent debtor's act, that will not enure to the liberation of the other, though there be not any statute provision on the matter. *Nadin v. Battie & Wardle*, 5 East, 147.

 Brandt v. Ogden.

although the promise was made by both the defendants, yet judgment was recovered against one only, by reason of the discharge of the other since the making of the notes.[1]

Judgment for the plaintiff against Brower only.

BRANDT, *ex dem.* WALTON and others, *against* O. and D. OGDEN.

Fort Miller Falls are the third falls mentioned in the Kayaderosseras patent, and the map of the commissioners of that patent, made in 1770, 1771, not correct.

EJECTMENT for lands in Washington county. The premises were claimed by the plaintiff under the Kayaderosseras patent, as being a part of No. 10, in the 25th allotment. The defendant rested his title on the Queensbury patent. The words in the Kayaderosseras patent, so far as respects the controversy, were, "from the head of the Kayaderosseras thence eight miles more northerly, thence easterly or north-easterly to the third falls of the Albany river, about twenty miles more or less." On the present trial it was conceded, that the "eight miles more northerly from the head of the Kayaderosseras" had been established by a former decision of this court, to run eight miles due

[1] A discharge extends to debts due from the insolvent jointly with others. *Wilson v. Gomperts*, 11 J. R. 193.

Compromises made by one or more partners or joint debtors shall not discharge the other co-partners or joint debtors; (sa. 1, 5, of chap. 257 of Laws of 1838, and amendment of sec. 2 by chap. 348 of Laws of 1845;) but a technical release for a creditor to one of several joint debtors will, it seems, operate as a discharge to all, unless qualified by a reference to the act of 1838 aforesaid. *The Bank of Poughkeepsie v. Ibbotson*, 5 Hill, 461.

In assumption, it is necessary to show a subsisting liability on the part of all the defendants; except in cases of infancy, death, or a discharge of one of them under the bankrupt or insolvent law. *Robertson v. Smith*, 18 J. R. 459.

Brandt v. Ogden.

north(a) from the head of the creek. A verdict having been found for the plaintiff, the case now came before the court on an application for a new trial, as being against the weight of evidence. The only question was, where the closing line of the Kayaderosseras patent was to terminate? The plaintiff insisted that Baker's Falls were the concluding point; the defendant, that it ended at those of Fort Miller. The grounds on which each side contended, are set forth in the opinions of the court; and, as the discussion was merely as to courses and distances, the arguments of counsel would be unintelligible without maps, and are, therefore, as involving no one principle of law, and affording no precedent in any other case, unnecessary to be detailed.

TOMPKINS, J. The material facts upon which the plaintiffs relied, to establish their construction of the patent, were, 1. That the survey of the Kayaderosseras patent, made by the commissioners who subdivided it in 1771, adopted Baker's Falls as the third falls.

2. That the survey of Cockburn, the deputy surveyor-general, who surveyed the patent, also terminated at Baker's Falls.

*3. That several of the allotments in the Kayaderosseras patent, lying without the line contended for by the defendants, have been settled uninterruptedly under that patent.

4. That Baker's Falls are marked on the aforesaid surveys as the third falls; and that Seth C. Baldwin testified that they had been reputed the third falls by people in the vicinity of them during his acquaintance there, which extended to the last seventeen years.

With respect to the survey of the commissioners, I would remark, that it cannot be of much avail to the plaintiffs, since it was made by persons selected by the proprietors

(a) This principle decided, *Jackson v. Lindsey*, January, 1802, and confirmed, *Jackson v. Reeves*, post, 299. *Brandt v. Ogden*, 1 Johns. Rep. 156.

Brandt v. Ogden.

of Kayaderosseras for the purpose, and whose disposition in locating the patent, must obviously have been favorable to the interest of their employers.^(a) This is confirmed by the fact of their having embraced in their plan of the patent, much land not included in the survey of Cockburn. Their survey, as well as that of Cockburn, which the commissioners believed to be incorrect, can therefore be of little importance, any further than they comport with the rights of the patentees, derived from the patent itself.

Neither can the settlements of other allotments, not embraced by a line running to Fort Miller Falls, give much aid to the pretensions of the plaintiff, since the lands in question have been settled under the Queensbury patent, which confessedly includes them. The direction of the closing line will vary from that given in the patent, if it terminate at either of the falls; neither will the distance in either case exactly conform to twenty miles. The words, as to the distance, however, are sufficiently broad to extend to either of those falls, without violation to the patent.

To rebut the conclusion favorable to the plaintiff's title, deducible from the preceding facts, the defendants showed that the premises in question were embraced in the patent of Queensbury, and were settled and held under that patent. They also proved, by five witnesses, that they had been acquainted with Fort Miller Falls for about forty years past, and that those falls were not only during that period generally known and reputed to be the third falls, but that they were so in point of fact.

It is a little remarkable that not a particle of testimony was afforded on the part of the plaintiff, to disprove the latter fact, which appears almost conclusive on the question; neither is there any contradiction of the reputation of forty years, or the knowledge of the defendants' witnesses in regard to Fort Miller Falls, unless it arise from the testimony of Baldwin. Supposing his testimony *to

(a) *S. P. Jackson v. Reeves*, post, 293.

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have been admissible, he is interested in the lands affected by the disputed line, and if he were not, a reputation of seventeen years only, in the vicinity, too, of Baker's Falls, a reputation commencing since disputes have originated about the line, and since it became the interest of the Kayaderosseras patent proprietors to excite and establish such an opinion, can have but little weight when contrasted with the testimony of the defendant's witnesses. They prove that Fort Miller Falls have been called and reputed the third falls from as early a date as the period of the survey of the Kayaderosseras patent; and establish the further undisputed truth, that they are in point of fact the third falls. The question as to the termination of the concluding line of the patent, must be settled by a construction of the patent. The evidence on the part of the defendant is decisive to fix its termination at Fort Miller Falls, and not at Baker's Falls, as the jury have determined.

I think, therefore, the verdict for the plaintiff was against the weight of evidence, and ought to be set aside.

SPENCER, J. Both of the parties claiming by title derived from the government, their pretensions offer a case of strict construction; their acts, unless as against themselves, can be no further noticed than they shall be found conformable to their rights. The partition by the commissioners, who were nominated by the party interested, cannot prejudice the rights of others. They had no right to hear and determine, but must be viewed as subservient to the interests and wishes of the proprietors. These lines, therefore, deserve little consideration, unless conformable to the right of the case. In the present instance we are to intend the defendants became the first possessors under the opposing patent, and thus the only inquiry is, whether the boundaries of the Kayaderosseras patent, which is the senior patent, includes the land in controversy.

If the closing line of this patent be run to the falls, set up by the defendant as the third falls of the Albany river,

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the premises are excluded. By the case agreed on between the parties, this line is to be run from the termination of the eighth mile run due north ; it is therefore unnecessary to examine whether that line was correctly run or not, as the court cannot but regard the agreement of the parties binding in that respect. There appear to have been five witnesses examined by the defendants, to establish the Fort Miller Falls to be the third falls in the Albany river.

These witnesses testify that they had known these [*9] falls as the third falls *for more than forty years ; they state the Stillwater Falls to be the first, Saratoga the second, and the Fort Miller the third falls. The only proof opposed to this is the map of the commissioners and the testimony of Seth C. Baldwin, who testified that Baker's Falls, to the northward of Fort Miller, were the third falls, and that a rock there was marked as such, but when, or by whom, does not appear. He says, too, that Baker's Falls, as laid down on the commissioners' map, had been, by reputation, for seventeen years past, the third falls ; that such was the general sense of the people in that vicinity, and that certain lots, depending on that construction, have been settled and held under the Kayaderosseras patent. I have said, and repeat it, that the line run by the commissioners, or the falls adopted by them as the third falls, cannot conclude the rights of persons claiming under other patents. It is true that the outlines of this patent were run by the deputy of the surveyor-general, but so uncertain were the commissioners as to the correctness of some of their lines, that part of the lands were marked, and drawn as disputed lands. The same observation may be made with respect to the running of lines by the deputy surveyor as was made with respect to the commissioners, that the claimants under other patents could not be affected by such running of lines.

The only question before the jury was, which were the falls intended by government, when the Kayaderosseras patent was granted. To illustrate this, there are five

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witnesses on the part of the defendants, speaking from a knowledge acquired more than forty years ago, and thus going back to a time antecedent to the partition. They assign, too, the most natural and obvious reasons for asserting the fact, by presenting to the jury an enumeration of the other falls on the river. Opposed to their testimonies is the single evidence of Mr. Baldwin, who appears, from the case, to be interested in lands affected by the running of this line. In addition to this, his knowledge of the fact in controversy has been acquired within seventeen years. The sense of the neighborhood, spoken of by Mr. Baldwin, is entitled to no weight. Opinions of this kind may be well or ill founded. The evidence itself, derived from these opinions, was illegal, and, therefore, deserved no consideration from the jury or the court. The settlement of lots under the Kayaderoseras patent depending on the construction now set up by the plaintiff, will not aid the cause; for it does not appear that these settlements are ancient. The closing line of the patent can derive no support from the terms "easterly," or "north- [*10] easterly," because, in running from the termination of the eight mile line, to either of the falls, the course is some degrees south of east. Nor can the distance of the last line reflect any light on the dispute; because, on either construction, it is about twenty miles. As an auxiliary consideration, entitled to considerable attention, it is to be noticed, that the line contended for by the plaintiff will twice cross Hudson's River, and yet the patent makes no mention of an incident so singular. There must have been, in all probability, a survey preceding the patent, and it is incredible that the surveyor should not have noticed twice passing the river, had it happened.

This cause was pressed on the court as involving the quietude of that part of the community. Whatever, in this respect, may be the result, it appears forcibly to my mind that the present verdict is against the decided weight

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of evidence, and, in my opinion, it ought to be set aside, on payment of costs.

LIVINGSTON, J. This verdict is palpably against the weight of evidence.

Whether the falls at Fort Miller were the third falls on the Albany river was the only question in issue: To establish the affirmative, four witnesses, wholly uninterested, testified that they had known them as such for more than forty years. That the falls at Stillwater were called the first, those at Saratoga the second, and those at Fort Miller the third. Another witness declared that he had known these several falls since the year 1758, and that those of Fort Miller were "at that time, and ever since had been, called and known as the third falls."

Opposed to this is the testimony of a single witness, who, after admitting he had an interest in setting up a different place as the third falls, testified, "that Baker's Falls were marked as the third falls on a rock; that, as laid down on a certain map called the commissioners' map, they were by reputation, as long as he was acquainted with them, which was seventeen years, the third falls, and that such was the general sense of the people living in the vicinity."

If there were serious contradictions between these witnesses, the jury ought to believe five, their characters not being impeached, rather than one who had a strong interest in swearing as he did; but if everything which the last witness declares be true, it is very little at variance with what the others had said. It does not contradict one very important item in their testimony, which is, that in point of fact the third falls are at Fort Miller. If it be [*11] true, as they swear, and it is uncontradicted, that there are only two falls below Fort Miller, and another at that place, how can a fall, further up the river, be the third falls? They also swear that they have known them as such for more than forty years, while the plaintiffs' witness speaks of a reputation in a certain vicinity of only

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seventeen years, which, as well as the mark of the rock he speaks of, may have originated with the owners of the land in the patent of Kayaderosseras.

But the partition of the patent of Kayaderosseras is relied on, and it is said that the line run by the commissioners, in 1771, it being the duty of the surveyor-general to attend, ought, together with the acquiescence of government, to put this question at rest. To this the answer is, that this partition is the act of the parties; the commissioners were appointed by them, and that they had no authority to determine definitively. The whole was, therefore, an *ex parte* act, from which nothing derogatory to the rights of government can be inferred. Whether the possessions up to this line, since 1771, will bar the right of the state, as to lands not then or yet granted between Baker's and Fort Miller Falls, is a question not now before us, because the premises in question are admitted to be contained within the patent of Queensbury, which was issued in 1762, and is, so far, an indication of the sense of government unfriendly to the plaintiffs' pretensions. Nor is there much weight in the observation that this patent is dated several years before the partition in 1771; for there is nothing to show that government was not as well acquainted with the situation of the third falls, which must have been a place of considerable notoriety, at the former, as at the latter of these periods. As little support can be derived from the circumstance of the line run by Cockburn, terminating at Baker's Falls; because this very line is admitted by the plaintiff himself to be very incorrect, and very essentially so in other parts of it.

Still less weight is there in the argument, when applied to these defendants, that certain allotments, settled under this partition, have been too long acquiesced in to be now disturbed. This partition, as to them, was *res inter alios acta*, and the acquiescence spoken of can only affect parties interested, and who, therefore, had a right, but neglected to interfere. The defendants claim no right to the several

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allotments which, it is alleged, will be affected by running a line from the termination of the eight mile line, to Fort Miller. And, so far from any admission by the [*12] proprietors *under the Queensbury patent, of the right of the lessors of the plaintiff, or those under whom they claim, to the spot in question, they have, for aught that appears, been in the peaceable possession of it ever since the date of the patent. I have taken no notice of a former decision of this court, settling the mode of running the eight mile line from the head of the Kayaderosseras creek, for it is not attempted at present to disturb it. This decision, favorable, as it must be acknowledged to be, to the proprietors under that patent, does not, in my opinion, at all touch the question between these parties.

Upon the whole, as the lands for which this suit is brought are admitted to lie in the patent of Queensbury, if the falls at Fort Miller be the *third* falls intended in the patent of Kayaderosseras, I think the evidence to that point was so very strong and conclusive, that the jury were not warranted in finding as they did, and that, therefore, a new trial must be had, on payment of costs by the defendants.

THOMPSON, J. The course of the eight miles north being conceded, the question made on the trial, and now the subject of litigation, was plain, simple, and purely a matter of fact, proper for the determination of a jury. At the circuit no objection was made to the competency of Seth C. Baldwin, a witness on the part of the plaintiff. Any objections, therefore, which may now be urged, on this ground, come too late. His testimony, I think, stands fortified by numerous circumstances that are at variance with the facts stated by the defendants' witnesses. The verdict cannot be said to have been against evidence: for there was testimony on both sides, the one contradictory to the other. Determining the credibility of witnesses, and weighing the force of circumstances, fall peculiarly

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within the province of a jury. But I cannot say I think the verdict is against the weight of evidence. It appears that the Kayaderosseras patent was laid out and divided among the patentees in the year 1770, by commissioners appointed under an act of the legislature, directing the surveyor-general to run the outlines of the patent, six weeks' notice having been given of the time and place of the commissioners' meeting, for the purpose, among other things, of affording persons claiming under adjoining patents, an opportunity of objecting to such outlines. These commissioners, and the deputy surveyor-general, the agent of the government, who were acting under the sanction of an oath, assumed Baker's Falls as the third falls *intended by the grant. It is not reasonable to [*18] presume that this was arbitrarily done, without having endeavored to ascertain the truth. If Fort Miller Falls were at that time so well known as the *third* falls, as represented by the defendants' witnesses, it is unaccountable why the line was not run there; or, at least, if it was matter of dispute, it was expressly made the duty of the commissioners to lay out the lands between the two *falls* as disputed lands. This, however, was not done; but they run to, and mark Baker's Falls as the third falls. Cockburn, the deputy surveyor-general, although varying from the commissioners in other respects, and laying down part of the land included in the commissioners' map as disputed land, yet assumes Baker's Falls as the third falls; and, for anything that appears, the present is the first time this fact has been questioned. All this, in my judgment, is contradictory to, and irreconcilable with, the public notoriety spoken of by the defendants' witnesses, that Fort Miller Falls were the third falls. It is undoubtedly a sound and correct principle, that, in the location of grants, known and established monuments shall control courses and distances; but where doubts may exist as to the monuments, courses and distances, if not to govern, ought, at least, to be entitled to considerable weight in ascertaining

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the, intention of parties. The course and distance given in the patent, from the place admitted to be the termination of the eight mile line, is easterly, or north-easterly, twenty miles more or less, to the third falls. To Baker's Falls is about twenty miles; to Fort Miller would be three miles further. The course to Baker's Falls also corresponds nearer with the course given in the patent. In addition, there is the testimony of Baldwin proving a general reputation that Baker's Falls were known as the third falls. The settlement and improvement of a very extensive tract of country, lying to the north of Fort Miller Falls, under the Kayaderosseras patent, recognising the line set up by the plaintiff, is entitled, in my judgment, to great consideration. Six different allotments would be more or less affected, and one entirely excluded by adopting the line set up by the defendants. An alteration, under such circumstances, would create great confusion and endless litigation. I think it is fairly to be inferred, from the facts stated in the case, that the defendants, or those under whom they claim, must have gone into possession knowing of the claim of the Kayaderosseras patentees, and this [*14] ought to be an answer to all considerations *of hardship. The line set up by the plaintiff was run by the commissioners in 1770. This must have been an act of public notoriety in that part of the country, and it is fair to conclude that there was no actual adverse possession of the premises in question at that time, or we should have heard of it as a defence in the present action. Besides, the patent under which the defendants claim was granted in the year 1762, only nine years before the commissioners' survey. Although the Queensbury patent may cover the premises in question, yet, if there be any interference, there can be no doubt that the Kayaderosseras grant, being the oldest, must be first satisfied.

Upon the whole, there is a concurrence of acts and circumstances detailed in the case tending to establish Baker's

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Falls, (a) as the third falls intended in the patent, which, to my mind, afford a more certain and satisfactory conclusion, than the testimony offered on the part of the defendants. The whole matter was fairly submitted to the jury, and I am not prepared to say they have not made the just conclusion. I am therefore of opinion, that the defendants take nothing by their motion.

KENT, Ch. J. I concur in the opinion last given, but, as the majority of the court entertain different sentiments on this case, there must be a new trial awarded.

New trial.

ROBERT and others, Executors of DE NOYELLES, *against*
GARNIE.

Parol evidence is not admissible to show from circumstances that the sum expressed in a receipt of 25 years' standing was continental money, and therefore amounted to less than the value expressed. (b) A payment for which a receipt is given to a person in his own name, is evidence of a payment on his own account, and that it was not made on account of a debt due from him and another, though there do not appear any direct tions to apply it to the separate account, especially if such payment be for the exact amout of a balance due from himself, and would overpay the joint debt.

DEBT on a bond in the penal sum of 225*l.* dated 17th March, 1773, conditioned for the payment of 70*l.* on the 1st of May, then next, and 42*l.* 10*s.* on the 1st of May, 1774.

At the trial, payment of part of the amount was indorsed on the bond, and for the exact balance with interest, the

(a) Upon this case coming before the court after the new trial awarded in the text, Baker's Falls are definitely settled as the *third* falls mentioned in the Kayaderoseras patent, the partition map of the commissioners in 1770 confirmed, and as to those two points the decision in this case overruled. See *Brandt v. Ogden*, 1 Johns. Rep. 156.

(b) See *Jackson v. Putnam*, 1 Caines' Rep. 358, and note there.

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following receipt was given in evidence: "Received, Haverstraw, 5th of May, 1779, of Isaac Garnie, the sum of one hundred and four pounds, on account of a bond given to the estate of John De Noyelles, deceased. E. W. Kiers, executor." The plaintiff's counsel then offered to prove that, at the time when the receipt was given, there was no other circulating medium than continental paper money, which was then very much depreciated; that Kiers had, about that period, received large sums of such currency, and from thence wished to infer that the money [*15] mentioned *in the receipt was continental money, and its value far less than the amount specified.

This being overruled, he offered to prove a joint and several bond to the testator, by Garnie and one Johnson, conditioned for the payment of 20*l.*, and insisted he had a right to apply the money in the receipt to the satisfaction of this last bond, as it did not appear that the debtor had directed its application. The judge, being against him on this point also, charged the jury to find for the defendant, in favor of whom they accordingly brought in their verdict. The application now made was to set this aside for misdirection.

Baldwin, for the plaintiff, urged the same reasons as were used on the trial, citing *Goddard v. Cox*, (2 Str. 1194.) to show the creditor's right to apply.

Woods and *Caines*, contra, not denying the authority, reasoned as in the decision of the court, which was delivered by

TOMPKINS, J. Two questions are made in this case:

1. Whether the evidence which the plaintiffs offered, relative to the currency, in which the sum of money mentioned in the receipt of E. W. Kiers was probably paid, ought to have been submitted to the jury?

2. Whether the plaintiffs were at liberty to apply that sum, or a sufficient part of it, to the discharge of the joint

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bond of the defendant and John Johnson, conditioned for the payment of twenty pounds?

Although receipts for money are examinable, they ought not to be affected by circumstances so extremely slight as those which the plaintiffs proposed to prove in this case.

The probability is, that the money mentioned in Kiers' receipt, if paid in continental money, was received by him at its real value, according to the then depreciated state of that currency.

This receipt was given nearly twenty-five years before the trial of the cause, and, after such a lapse of time, it would be extremely mischievous to permit the party, whose co-executor had given it, to destroy its operation by light circumstances.

There is no pretence for the plaintiffs to apply the sum of money paid in May, 1779, to the discharge of the bond of Johnson and the defendant; the receipt is for 104*l*. on account of a bond given to the estate of De Noyelles. There was at that time no one bond due the testator upon which a sum equal to that paid was due, except the bond upon which this suit is brought, and the sum of 104*l*. was the precise amount then remaining unpaid upon *that bond. This shows that both debtor and [*16] creditor intended at that time to apply the payment to the discharge of this bond.[1]

We are therefore of opinion, that the testimony offered by the plaintiffs, which was overruled by the judge, was properly rejected, and that the defendant ought to retain his verdict.

New trial refused.

[1] The party who pays money has the right generally to apply the payment; but if he do not make any specific appropriation thereof at the time of payment, then the party receiving payment may apply it as he pleases. Neither party making any specific appropriation, the law will make such as will accord with justice and equity and the benefit of both parties. *Patterson v. Hale*, 9 Cow. 747; *Seymour v. Van Slyck in error*, 19 Wend. 19; *Allen v. Culver*, 3 Denio, 284; *Van Rensselaer, ex. v. Roberts*, 5 Denio, 470.

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DAVY *against* HALLETT.

By a valued policy on freight, "at and from" one port to another, and "at and from thence" back to the original port, for which a premium is paid, double to that which would be demanded for the outward voyage, the freight to the full amount of the valuation is covered on each voyage, and the insured, on a capture on the return voyage, is entitled to recover the full amount of his policy, without making any deduction for the freight received on the outward risk. On a valued policy on freight, if there be an inchoate right to some, and the transaction *bona fide*, the value cannot be inquired into. If a shipowner insure his vessel and freight with two sets of underwriters, and on a capture, abandon first to those on the vessel, and then to those on the freight, after which he takes 50 per cent. of his claim on the underwriters on the vessel, and in payment of the other 50 an assignment of their rights in the vessel, he will be entitled to receive the freight which they would have been entitled to, and to recover, in his own right, from the insurers on the freight, the full amount of his policy, deducting the *pro rata* freight earned previous to the abandonment, in the voyage on which captured.

ASSUMPSIT upon an insurance on the freight(a) of the sloop Hannah, valued at 2,000 dollars, "at and from Philadelphia to Omoa and Golfo Dulce, and at and from

(a) Freight being the profit or earnings derived from the use or employment of a vessel, must, abstracted from insurance, as an accessory, necessarily follow its principal. Whether this rule shall be adopted and govern in cases arising under insurance law, has been much doubted, greatly canvassed, and is, even now, by no means universally acknowledged. Its effect, on an abandonment of a ship, seems to have been first urged and allowed in *Lenox v. United Insurance Company*, 1 Johns. Cas. 377, by which it was decided, that as by a valid abandonment of the vessel the whole interest in her vests in the underwriter, her subsequent earnings necessarily pass to him, as a right incidental to his ownership. Anterior to this determination, the point had never been mooted in Westminster Hall, and its posterior agitation there is believed to have arisen from that adjudication having found its way to England in a copy of the *Lex Mercatoria Americana*, transmitted to that country by the writer of this note. For, though the question must necessarily have frequently presented itself, it does not appear to have been noticed, as an object of discussion, till after that period. The doctrine of *Lenox v. United Insurance Company* is the settled law of this state, (*M'Bride v. Marine Insurance Company*, 7 Johns. Rep. 431;) but as, in insurance law, ship and freight are distinct subjects, the insured on

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thence to Philadelphia," at a premium of twenty-two and a half per cent. The facts, as they appeared in the case made, were these: In August, 1800, the vessel sailed on

freight may recover against his underwriter a total loss, though he has, by first abandoning the vessel, passed to the insurer on her the whole of the subject matter which constituted the basis of the policy on freight. *Livingston v. Columbian Insurance Company*, 3 Johns. Rep. 49. The English courts seem to favor the law as laid down in *Lenox v. United Insurance Company* so much, that Lord Ellenborough doubted whether, after an abandonment of the ship, an abandonment of the freight could be made; (*Sharpe v. Gladstone*, 7 East, 24;) therefore where, on a technical total loss, the abandonment of the vessel preceded that of the freight, which was subsequently earned, it was held that the assured could not recover; because, as freight was ultimately earned, it was not in fact lost; and because, if lost, it was by the act of the assured in abandoning first to the underwriter on the vessel, and not by any peril insured against. *McCarthy v. Abel*, 5 East, 389. But if an assured on vessel and freight abandon the latter first, receive the full amount, and expressly undertake to pay his underwriter on it whatever freight be paid to him, the insurer on freight will, upon such promise, be entitled to recover from his assured the amount of the freight actually received by him. *Thompson v. Rowcroft*, 4 East, 34. So, although the abandonment of the two interests be simultaneous, and the assured has received the freight as agent for the underwriter on the ship, who has notified him not to pay it over to the insurer on the freight. *Leatham v. Terry*, 3 Bos. & Pull. 479.

What decision would be pronounced in a case where the action was by an insurer on freight, after payment of a total loss, against an insurer on the vessel who had, subsequently to the abandonment, received the freight afterwards earned, the courts, both of England and of this state, appear studiously to avoid. Enough for the day is the evil thereof. But if freight be the incident necessarily following its principal, the ship, and due to the insurer on her in right of ownership, it seems that the insurer on freight cannot recover. The inevitable consequence, therefore, of considering freight, in insurance law, as the incident to the ship, is to render policies on freight mere wager policies. That freight should be so deemed is somewhat strange, when vessel and freight are, according to that very law, acknowledged to be distinct and independent subjects. *Livingston v. Columbian Insurance Company*, 3 John's Rep. 49; *Sharpe v. Gladstone*, 7 East, 24. That one distinct, independent subject can be incidental to, or merely dependent on another, is not easily reconcilable to common sense. Were it not law, it would appear a contradiction in terms. The manifest injustice of subjecting to general average an interest which is, in any one instance, deprived of the benefit of salvage, is self-evident. Yet such is the consequence of holding the freight a mere incident to the ship, and inseparable from the property in her. That

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the voyage insured, and arrived in safety at Golfo Dulce, having earned freight to the amount of 2,000 dollars. She then took in a return cargo for Philadelphia, the freight

the interests of the two sets of underwriters on vessel and freight can be separated, Lord Ellenborough seems to think practicable in the case of a chartered ship. *Sharpe v. Gladstone, ubi sup.* Why this cannot be done in the case of a seeking ship, is not, to my legal optics, very apparent. The rule of property which gives to the owner the right to all benefit arising from its use or employment, is the only argument against it. As a rule of property it is inherent in its subject matter, and cannot be separated from it. But as a rule of contract, to govern the disposition of property, it would almost annihilate its utility. Every day's experience shows how the right of property may, by contract, be in one man, and the benefit in another. How, by contract, various interests in one principal may exist, be diversified, and the right of property, for a time, be subservient to the whole. Separate the interests of vessel and freight for the time that the parties to the several policies separate them by their own acts, that is, for the voyage, and it is humbly presumed all the supposed repugnancies of a beneficial interest in one, and an absolute interest in another, will be reconciled. Why is this more difficult than to imagine a legal interest in one person, and the beneficial in his *cestui que trust*? The underwriter on the vessel, by his undertaking on the body, virtually renounces a right to the freight for that voyage; because he limits his responsibility to the vessel alone. The underwriter on the freight claims not anything in the body of the vessel, because he guarantees only the freight. The assured confines his claim on each within the limits of his respective policy, who, by payment of its amount, becomes a purchaser for a valuable consideration, to the extent of the interest he contracted to guaranty. Each underwriter insures a separate interest for a separate premium, and a separate benefit of salvage. This benefit of salvage is necessarily circumscribed within the confines of the subject insured. If it be extended beyond it, the underwriter, on payment of his subscription, becomes, without any consideration, a gainer of the excess. Restrict him to his policy, what is the consequence? As in the valuation of the vessel, if it be a valued policy, (and the principle is the same if it be an open one,) the body, tackle, apparel and furniture, (that is provisions for the voyage,) are included, he, on abandonment, receives all that which constitutes the valuation. If, on an abandonment of the freight, the underwriter on that interest were to receive all the profits arising from the freight, after payment of charges on it, (of which wages will necessarily be one,) he acquires no more than he has bought and paid for. By conceding it to him, he does not derive a clear profit from the capital or property of another. By settling the amount of his policy, disbursing for the wages of the seamen, and other charges on the freight, he becomes the purchaser of only a contingent surplus. In doing this, he, in the consideration-money advanced, actually pays for the safe con-

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of which was equal to two thousand dollars more, and sailed on her homeward voyage, but was, on the very next day, captured by a British man of war, who carried her

duct of the interest of his brother insurer. Thus each of these tenants in common, (if the figure be allowable,) derives title from the same source, but under different instruments, and takes an interest only according to his separate purchase-money. This very apportionment of the charges on the separate interests was practised in *Sharpe v. Gladstone*, and the assurer on freight recovered from his assured only the net balance of the freight received, after deducting the items to which it was, *eo nomine*, liable.

It is true that in *Thompson v. Rowcraft*, Lord Ellenborough denied the right of the defendant to deduct for wages; but let it be remembered that he had not paid them; whereas in *Sharpe v. Gladstone* he had. One circumstance which, perhaps, is not unimportant in considering the effect of an abandonment of these separate interests, is, that each person claiming under it, is a claimant with notice of the other's actual interest, or a claimant assenting to its being granted. That a cession of the ship, to the underwriter upon her, should merge the interest of the insurer on the freight, is, in effect, to allow a man, by his own act, to avoid his grant; and that in favor of a person conusant of, or assenting to, its being made.

It follows, also, that the assignee, or vendee, (though an insurer, after payment of his loss, is not exactly so,) with notice, is in a better situation than his assignor. For if freight only be insured, abandoned, subsequently earned and received by the assured, he cannot retain against the underwriter of it, yet the underwriter on the vessel, who acquires his rights under the insured, can so retain, notwithstanding he is acknowledged to stand merely in the place of his assured. But, it is said that principle applies only to the right in the property, and subsequent liability in virtue of it, but not to his contracts respecting that property; for, as Lord Ellenborough observes, in *M'Carthy v. Abel*, (5 East, 293;) "was it ever heard of, that a contract should run with a chattel. Put the case of a man purchasing a wagon on the road laden with goods, he is not bound to carry the goods to their journey's end, though the carrier, the vendor, who contracted so to do, will be liable on his contract." Granted that a contract will not run with a chattel, to bind the owner personally, in the hands of whomever it may subsequently come. But suppose the vendee of the wagon knew before his purchase, that the vendor had contracted to carry for a certain compensation the goods laden in it, that a third person had paid to the vendor the price of the carriage to be let into the benefit of the contract, after which the vendee takes possession of the wagon and its loading, carries on the goods and receives for their carriage the money due under the contract transferred to such third person, on what principle of law or equity, shall he not be liable for money had and received to the use of another, after availing himself of the contract of the *locatio rei*, for which, not he, but another, had paid the

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into Belize, in the Bay of Honduras. There she remained for some time, when her crew were taken out of her, and she was sent under charge of a prize master to Jamaica

consideration? That executory contracts cannot run with a chattel is, from the temporary duration attributed by law to chattel interests, most clear. But that contracts executing, for which the chattel is pledged, such as operate *quodam modo* as liens, will be binding on an assignee or vendee of a chattel, seems almost as clear. Suppose the owner of a wagon had hired it for a journey, that there was that species of bailment known in the law as *locatum*, and, after delivery to the bailee, the owner, whilst the wagon was on its rout, should sell it with notice; would not the vendee take subject to the charge, and the bailee, in virtue of his possession, and the notice, be entitled to retain and use the wagon under the contract with the vendor, against any claim of the vendee? When, indeed, the wagon is once in the actual possession of the vendee, all executory contracts cease to operate upon it, though the vendor will remain personally liable. It is humbly conceived that the insurer of a ship may, in order to avoid the hardships acknowledged to result from the doctrine of *Lenox v. United Insurance Company*, be deemed to take her, after an abandonment, exactly as the purchaser of a *res locata*. If we suppose him to take, by contract, a modified interest for that voyage, instead of taking the whole interest, in the first instance, in virtue of absolute ownership, the whole difficulty appears to cease. This very separation of interests was made, and no one disputed its validity, in *Riley v. Delafield*, (7 Johns. Rep. 522.) Let the policies for the voyage be held, as the contracts of sale in that case, to pass separate interests for the voyage only, and all the supposed discordancies of insurance law, upon this subject, will be found immediately to harmonize. It may be urged against the deductions above endeavored to be drawn from the doctrine of the *res locata*, that as by the possession of the vendee, the lien, which the bailment of the chattel had created for performance of the contract respecting it, would be gone; so by the possession cast on the insurer in consequence of the abandonment, the contract for carrying on freight would be discharged. In addition to the observation on the performance of that contract before made, it may be answered, that the possession in the case first put is actual; in the last, constructive, the captain being the person in actual possession of the vessel, as a general agent, in whom, after abandonment, the several interests vest for the respective benefit of the different parties. It may be added that the possession of the insurer is by operation of law, and *actus legis nemini facit injuriam*. It may also be questioned, perhaps, how far, under a system in which wagers are merely tolerated, but not favored, it may be consonant to principle to reduce to a gambling policy an honest contract for lawful indemnity.

The incongruities arising from the doctrine of freight being in insurance law, the inseparable incident to the ship, seem day by day to multiply. In

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for trial. Whilst in possession of the captors, an abandonment was duly made of the vessel, cargo and freight, to the respective underwriters. Those on the vessel and

McCarthy v. Abel, to prevent the manifest injustice of making the insurer on freight pay as for a total loss, and yet refuse him the benefit of salvage, an abandonment during the existence of a technical total loss is defeated, because an actual total loss did not subsequently take place. A decision that confounds the technical total loss in insurance law, with the actual total in fact, and renders the former dependent on the latter. The absurdity will be still more glaring, if we suppose the owner of the goods to have abandoned; for, under the same circumstances, the loss of the goods under one policy of insurance would have been total, and under another policy the freight of the goods so lost would have been earned. This is the consequence of applying the rule of incident and principal at common law, to distinct subjects in that of insurance. A heterogeneous mixture of the law of commerce, and that of the land is thus produced, against the evils of which we are gravely told the parties must by their contract provide.

It is to be observed, however, that the case of *Livingston v. Columbian Insurance Company*, so far as respects the right of recovery in the assured on freight, is opposed to that of *McCarthy v. Abel*.

The result of the above reasoning would be, were it correct, greatly to impeach the judgment in *Lenox v. United Insurance Company*. That case, however, being by the owner of the vessel against the underwriter on her, may be distinguished from one in which the insurer on freight should be the plaintiff against the insurer on the ship; and upon the principle that every man's act or grant shall be taken most strongly against himself, may be upheld, though the conclusions above endeavored to be drawn, should be admitted.

Where the insurance on freight is by the charterer of the ship, as his is a mere usufructuary interest in her employment for the voyage, and not in her body, it will not be affected by an abandonment of the vessel; he, therefore, on a total loss, will, notwithstanding her owner abandon to the insurer upon her, be entitled to recover under his policy the full amount of freight payable by the terms of the charter-party. *Puller and others v. Staniforth*, 11 East, 232. But if, during the voyage for which chartered, the captain has, in an intermediate voyage, earned freight which the charterer would be entitled to deduct from the sum due under the charter-party, the benefit of such deduction will enure to the underwriter. *Ib.* But whatever may be the law between the insurers on ship and freight, after payment of their respective losses, it is most unequivocally settled, that an insurer on freight has not, in such a case, any claim upon the insurer of the cargo, who has received the net proceeds after a loss under the policy. *Marine Insurance Company v. United Insurance Company*, 9 Johns. Rep. 189. To warrant a recovery under a policy on freight, the right to freight must have attached. Where

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cargo accepted the abandonment of the interests they had severally insured; but the defendant, who had subscribed the policy on the freight, refused. The sloop and her cargo were afterwards proceeded against in the vice-admiralty, and by a decree of that court acquitted, but the claimants condemned in costs to the captors. This sentence being appealed from, the sloop and her cargo were, in conformity to the practice of the admiralty, ordered to be appraised, and restored to the claimants, on their giving security to account for the value, in case the sentence should be reversed. The vessel and cargo were accordingly appraised in pursuance of the decree, security given by two sureties, who took possession of both, and sent them to their correspondents, Messrs. Elliston and Perot of Philadelphia, in whose possession they were at the commencing the present action. The plaintiff, however, on the arrival of the vessel at the *quarantine ground*, agreed with the underwriters upon her, to be substituted in their [*17] place, and to defend the appeal at his own risk

that is the case, and the policy is "valued at the sum insured, carried or not carried," the assured will be entitled to recover as for a total loss, though only a part of the cargo be on board when it happens; (*De Longuemere v. Phoenix Insurance Company*, 10 Johns. Rep. 127;) so if the policy be merely valued at such a sum, and the residue of the cargo, though not on board, be ready for shipping. *De Longuemere v. Fire Insurance Company*, 10 Johns. Rep. 291. If, however, there be not any *specific* goods to be shipped, but they are to be obtained, and there be not any *specific* sum to be paid as freight whether the goods be shipped or not, though the policy be valued, and some goods be on board when the loss takes place, the policy will (in England) be opened, and the assured recover only for the freight of such as were actually laden; (*Forbes v. Aspinall*, 13 East, 323;) *aliter*, where there is a certain cargo, the freight on which would have been earned had not the accident taken place; for, to prove the interest in the freight insured, a contract must be established between the shipper and the owner of the vessel, under which the insured would have been entitled to freight had the voyage not been stopped by a peril insured against. *Ib.* But see *Stevens v. Columbian Insurance Company*, post, 43. If the goods on which the freight insured specifically exist, there must be an abandonment of the freight, though the vessel be incapable of prosecuting the voyage. *Purmaster Toddhunter*, 3 Camp. N. P. 541.

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and expense, on their paying him fifty per cent. In consequence of this, the money was paid by the insurers on the sloop, who executed a power of authority to Davy, constituting him their agent and attorney to defend the appeal in their names. By virtue of this authority the plaintiff had, on discharging the advances and expenses on account of the vessel, got possession of her at the time of trial, and had received 2,000 dollars, the amount of her return freight. It was admitted the premium on the outward voyage only would have been about one half of that paid, and that the decree of the vice-admiralty had been recently confirmed, but without costs. A verdict being taken for 2,245 dollars, it was agreed, that if the court should be of opinion the plaintiff was entitled to recover as for a total loss, the proportion of freight earned, which the defendant might be entitled to, if any, should be deducted, and the account adjusted. In case it should be thought the plaintiff was entitled to only a partial loss, the same to be in like manner adjusted, on such principles as the court might direct, with liberty to either party to turn the facts of the case into a special verdict.

Hoffman, for the plaintiff. The first question is as to the true construction of the policy. The defendant contends the valuation is to be thus interpreted; one thousand dollars out, and one thousand home; making, in the whole, the sum of two thousand dollars; one thousand of which was earned on the arrival at Golfo Dulce. We insist that the homeward and outward freight are valued by the instrument at 2,000 dollars each. The amount of premium paid is for 2,000 dollars round. The only case at all analogous to this, are insurances on goods out and home. In those the valuation extends to both voyages.^(a) The second point will depend on the right to abandon. That was complete; for the loss continued total not only then, but

(a) This is the foundation of what are termed short interests. See 1 Lex. Mer. Amer. 345.

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down to the very time of action brought. The assured, therefore, at the period of entering into his agreement with the underwriters on the ship, had divested himself of all his interest in the several subjects he had insured. They were fully transferred to the various insurers; and, therefore, on the principle of the *United Insurance Company and Lenox*,^(a) those on the vessel were entitled to the freight earned after the capture. In this situation, the plaintiff, by a fair sale to him, and by relinquishing one half of his just claim, becomes a *bona fide* purchaser of the [*18] rights of the underwriters *on his vessel. In this capacity, and by a power from them, he receives the freight due to the then owners. He now applies to the defendant in his own right, for a loss on a policy to himself. The case states that the proportion of freight to which the defendant may be entitled, shall be deducted from the amount of the verdict. It is not meant, however, that there shall be a set-off, for that cannot be of what arises after suit commenced. It is introduced only to give the court an opportunity of deciding what *pro rata* freight the defendant may be entitled to, and up to what time.

Boyd and Pendleton, contra. There can be no doubt that in conscience the plaintiff is not entitled to recover. He has, allowing his own interpretation of the contract, already received the 2,000 dollars insured. But the policy was for one entire risk out and home, amounting to two thousand dollars in the whole. This could not be apportioned. *Lorraine v. Tomlinson*, Doug. 585. Nor could the premium, (b) which was for one gross sum. This is one criterion to judge of the durability of the engagement. As therefore the

(a) See the special verdict in this case, and the reasons of the counsel, on both sides, in the court of errors. 1 Lex. Mer. Amer. 397.

(b) Whether a premium can be apportioned, depends on whether the risk be at any period suspended so that the underwriter can say "I am free," and upon the usage of the trade. See *Stephenson v. Snow*, 3 Burr. 1237; *Long v. Allen*, Park. 390; *Bermon v. Woodbridge*, Doug. 781; *Meyer v. Gregson*, Park. 389; *Tyrie v. Fletcher*, Cowp. 666.

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contract was entire when the abandonment was made, it necessarily transferred the outward freight which had been earned. Instead of this, an attempt is made to confine it to what was acquired between the time of sailing from Golfo Dulce and the capture, that is, just one day's freight. But we contend the assured, by his agreement with the underwriters on the ship, placed himself in his original station, and, having received the full freight, stands, as respects the defendant, exactly as if the capture had never taken place. If the assured has, by the manner in which he has conducted his abandonments, deprived us of the freight we have insured, he would be liable to us, in an action against him, to the amount of what we might pay. The court, therefore, will not sanction a recovery in this action, merely to give the defendant a recourse against the plaintiff in another. In *Thompson v. Rowcroft*, 4 East, 34, under a similar abandonment of all the interests insured after a capture, it was held that the insurer on freight might, after payment of a total loss to the insured, recover from him the amount of freight which he had received. It is true, in this case there was an express agreement to pay it over. But that is no more, as we contend, than what the law implies. For whatever is received during the voyage insured, is, after abandonment, to be carried to the credit of the underwriter. 2 Emer. 222. As *to [*19] the principle of set-off relied on, it cannot be applicable in the present discussion. The case was drawn up to submit all the rights of the parties to the court.

Harison, in reply. In some respects the insurance may be considered as indivisible. Had a loss taken place at an early period, there would have been no return of premium. But the contract was, in effect, on two separate voyages, valued, during the whole of each voyage, at 2,000 dollars. Had it been on the cargo, and the vessel had arrived at her outward port, the return cargo would have been substituted for the former, and, in case of loss, the anterior voyage

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would never have been considered. So here the reasoning is the same. The full amount, therefore, is what we have a right to claim, without affording to the underwriter any title, by our abandonment, to what has been earned in the first voyage. With respect to the deductions, they can be only such as the defendant was entitled to at the time when, by the abandonment, they were fixed.—The general right of the plaintiff to recover, cannot be affected by what he has received in *auter droit*; as the substitute of the insurer on the vessel. He is a *bona fide* purchaser from them, and whether he paid by cash, or a release of a debt due to himself, is immaterial. The freight due to the underwriters on the ship after the capture, was not that which arose out of the original contract between the shipper and plaintiff, but sprung from a meritorious consideration, on a new contract arising out of the old one. *Curling v. Long*, 1 Bos. & Pull. 637. If any apportionment is to be made of the freight, it must be by deducting the amount of what would be due for one day. *Luke v. Lyde*, 2 Burr. 888.

KENT, Ch. J., delivered the opinion of the court. This is a case of a valued policy upon freight, and the valuation becomes a very material fact in the consideration of the cause. The plaintiff was owner of vessel, cargo, and freight, and had them all fully insured, and the vessel being captured after the return voyage had commenced, he duly abandoned all the subjects to their respective insurers. The insurance was for two thousand dollars in value, of freight; and if, at the time of the total loss, there was an inchoate right to a freight to the amount of the insurance, the plaintiff must be entitled to recover. This principle was fully established in the cases of *Montgomery v. Eggington*, 8 D & E. 862, and *Thompson v. Taylor*, 6 D. & E. 478.

In the present instance there was, when the vessel [*20] was captured, an inchoate *freight attached, equal to 2,000 dollars. There was some freight already earned when the capture took place, but the amount of it

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becomes immaterial, as the valuation in the policy precludes inquiry into the value; and this valuation is to be adhered to, if the case be fair and honest between the parties, notwithstanding events in the course of the voyage may render the loss even advantageous to the insured. *Shawe v. Felton*, 2 East, 109. It is sufficient if there be freight at risk, equal to the sum insured, when the loss happens, and that some freight has been already earned for the insured. If we were to sustain an inquiry into the value of the freight, it would be doing away the effect of the valued policy.

Seven objections have been stated against the plaintiff's right of recovery in this case, but it appears to me that they are capable of a sufficient answer.

The abandonment of the vessel took away from the insurer on the freight, the *spes recuperandi*, or the chance of an ultimate recovery of the subject; because, as between the insurers on the ship and freight, the claim of the insurer on the ship to the freight must be admitted to preponderate; and this seems to have been the opinion of Lord Ellenborough, in the recent case of *Thompson v. Rowcroft*, 4 East, 84. The abandonment of the ship did not affect the plaintiff's right to a proportion of the freight on the return voyage. This was so considered in the case of *Lenox v. United Insurance Company*, which was finally determined in the court for the correction of errors in 1801; and although the court was divided in that case, and the majority of the bench did not concur in any opinion on the merits of the cause, we are not now disposed to question the correctness, and much less the authority, of that decision. It was determined in that case, that upon abandonment of the vessel, the owner of the freight, being also owner of the ship, did not thereby abandon his freight *in toto*, but that he retained a certain part to be apportioned *pro rata itineris*, and, consequently, to be carried down to the time when the loss happened. The insured, therefore, upon the vessel, as between him and his insurer, still retained his right to a ratable freight, and if

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he has had the precaution to have his freight insured, we do not see why he may not resort for indemnity to the insurer upon the freight. As long as vessel and freight are regarded in our law as *distinct* subjects of insurance, the inconvenience that we have suggested, which falls [*21] upon the insurer on *freight, seems to be inevitable.

There is in this case conflicting rights, and some one must yield. The owner of ship and freight is authorized to insure each of them distinctly, and the law must have intended that each of the policies should have a full and effectual operation, according to the established principles of insurance.[1] It would be to maintain a paradox to contend, that by an abandonment of the ship in such a case, the remedy upon the policy upon the freight was forever gone. One contract cannot be destroyed by the operation of another contract *inter alios*. The insurer upon freight must, therefore, submit to a total loss in every such case, with the exception of the ratable freight which does not go with the abandonment.[2] The abandonment of the ship, is an act in which he has no direct concern, and his contract with the insured contains no control of that act. The loss of any chance of recovery of freight is a consequence *incidental* merely, to the abandonment of the ship, and arises from meeting with the paramount claims of the insurer on the ship; and he must be left to provide against it by some special contract with the insured, as was done in the case of *Thompson v. Rowcroft*.

Another objection to the recovery in this case is, that freight, to the amount of 2,000 dollars, had already, during the course of the same voyage, been earned and re-

[1] Ships and freight are distinct subjects; and the insured may therefore recover of the insurer, though he has abandoned the vessel, and thereby passed to him the whole subject matter which was the basis of the policy on freight. *Livingston v. The Col. Ins. Co.*, 3 J. R. 49.

[2] An abandonment rightly made of a vessel lost at sea, by capture, transfers as well the *spec recuperandi*, as the interest of the assured in the vessel lost, although the loss has not been actually paid by the insurer. *Rogers v. Hosack's Est.*, 18 Wend. 319.

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ceived by the plaintiff. But the present insurance was not upon the totality of freight for the whole voyage, but upon so much freight, in *that voyage*, as would amount to 2,000 dollars. The observation, therefore, of 2 Emer. 222, does not apply, when he says that the freight received by the insured in the course of the circuitous voyage, is received on account of the insurer, if by perils an abandonment becomes necessary. The author is there speaking of insurances upon the whole subject for an entire voyage. The present case is analogous to that cited in 2 Valin, 87, and 2 Emer. 39, 40, in which one caused an insurance to be made to the amount of 1,000 livres upon goods, on board a vessel from America to Marseilles. The vessel sailed with a cargo to the amount of 3,000 livres, and discharged two-thirds thereof at Cadiz, leaving goods on board, for the remainder of the voyage, to the amount of the insurance. It is the opinion of these authors, and the same is confirmed by Pothier, that the policy was not thereby reduced two-thirds in value, but operated still upon all the cargo on board, to the amount of the 1,000 livres. To apportion the loss and gain in this case, so as to make the gain of one moiety of the outward [*22] freight enure to the insurer, and the loss of one moiety of the homeward freight to fall upon the insured, would be an arbitrary rule, and would not give the plaintiff his just indemnity. It would be changing the legal operation of this contract, and making it an insurance of one moiety only of the outward, and one moiety of the homeward freight, instead of an insurance to the amount of the valuation on so much freight pending, when the loss arose. The payment of the double premium is a pretty sure index to the intent of the parties, that the policy should attach on the outward, or homeward freight, according to events. The policy was to be valid and operative as long as there was aliment to keep it alive.

With respect to the subsequent contract between the plaintiff and the insurer on the vessel, it appears to us not

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to have any influence on the present demand.[1] It was not a waiver of the abandonment, but a fair repurchase of the right of redemption of the vessel, for a valuable consideration, and we think the present question ought to be decided in the same manner as if no such contract and substitution had taken place. The abandonment had been accepted, and the right of property in the vessel absolutely vested in the insurer.

Our opinion accordingly is, that the plaintiff is entitled to recover as for a total loss, subject, nevertheless, to a deduction of the small ratable freight, which did not pass with the abandonment of the ship, to be adjusted according to the principles established in the case of *Lenox v. The United Insurance Company*, and such is the decision of the court.

LIVINGSTON, J., having been concerned, gave no opinion.

Judgment for the plaintiff for a total loss.

 POST and LA RUE against NEAFIE.

Debt will lie on a decree of a court of chancery, in a sister state, if it be simply for the payment of a sum of money by the defendant, without any acts to be done by the plaintiff. And if the decree be for the payment of one gross sum to several persons, though their proportions be previously specified, the action may be joint, and is the most appropriate form, *ut semb.*

THIS was an action of debt upon a decree pronounced by the court of chancery for the state of New Jersey, where, by a law passed on the 13th of June, 1779, it is

[1] If the assured, after an abandonment of the vessel, purchase her for his own account and benefit, it is a waiver of the abandonment, and he is entitled to recover for a partial loss only. *Abbot v. Sebor*, 3 J. C. 39; *Saidler v. Church*, *id.* And although the assured gave due notice of the time and place of sale to the insurer. *Ogden v. New York Fire Ins. Co.*, 10 J. R. 177; 8 C., in error, 12 J. R. 25.

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thus enacted: "That when any cause shall be finally determined in the court of chancery, (a) the clerk of the court shall enter together, in order, the bill, answer, pleadings, reports, decretal orders, and decree, in such cause, in a book to be kept for that purpose, which shall be signed by the chancellor, as of the day on which such decree *was pronounced; but such decree shall not contain [*23] any recital of the bill," &c.

"(b) That the decree of the court of chancery shall, from the time of its being signed, have the force, operation and effect of a judgment at law in the supreme court of this state, from the time of the actual entry of such judgment." By a subsequent clause, when a defendant shall not comply with a decree made, the court may compel performance by sequestration, *fieri facias*, or *capias ad satisfaciendum*. On the trial, which was before Livingston, J., at the New-York sittings, in July, 1803, these appeared to be the circumstances of the case:

The defendant, having an estate under mortgage to the commissioners of the loan-office, sold it to Post, and covenanted to pay off the encumbrance. This not being done, the premises were put up to sale at public auction by the commissioners from whom La Rue purchased it, received a conveyance, and brought an ejectment against Post. He, being thus sued, instituted an action of covenant against Neafie, for not exonerating the estate; upon which Neafie filed his bill, alleging a confederacy to oppress and defraud him. When the cause was set down for hearing, the parties came to a compromise, by which they agreed that Neafie should, within a fortnight, repay La Rue the amount of his purchase-money, with interest; pay all the taxed costs in chancery, and in the two suits between himself and Post, and between Post and La Rue, and also all the fees paid, or engaged to be paid, by Post and La Rue to their solicitors and counsel; that Neafie's wife should execute

(a) Sec. 45.

(b) Sec. 46.

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and acknowledge the conveyance to Post, and La Rue and his wife, execute to him a release and quitclaim, in consequence of which the two suits at law should be discontinued and the bill in chancery dismissed. Neafie, however, not complying with these terms, an interlocutory order was made to the same effect, referring it to a master to state the several sums due, and he, having ascertained their respective amounts, gave in his report specifying the *quantum* due to each of the defendants in his own right, and the amount of the whole together. Upon this report the chancellor founded his decree, thereby ordering the matters and things, contained in the order and report, to be performed "according to the tenor and true meaning thereof," and that Neafie should pay the plaintiffs the sum for which

they now proceeded. To establish their right to re-
[*24] cover, they gave *in evidence, an exemplification of the decree and proceedings duly authenticated, and offered to prove the seal and signatures, but they did not show that this decree had been entered in the book prescribed by the 45th section of the act of June, 1779, any further than it appeared from the certificates authenticating the exemplification, nor did they adduce any testimony to evince the effect of a judgment in the supreme court of New Jersey. Upon this the defendant moved for a nonsuit, on the following grounds: 1st. That debt will not lie on a decree of a court of equity; 2d. That if in any case it can be maintained, it must be on a decree for payment of a specific sum of money alone, without any act to be done by the other side; 3d. That if such an action can be supported, where any acts are to be performed by the other side, all such acts must, for the ends of justice, be considered as conditions precedent; 4th. That the present plaintiffs, from their own showing, could not join, the sum for which the action was brought, being an aggregate of several parts due in different rights. The judge, having overruled these objections, charged for the plaintiffs, in favor of whom a verdict was rendered, to set aside which the de-

fendant applied, on the same reasons as those urged, for a non-suit.

Hopkins, for the defendant. On the first point it may perhaps be sufficient to remark, that no example is to be found in the history of the law, of any such action being maintained. I assume it, therefore, as a position, that none has ever been brought. If so, then I shall think the remark of Lord Coke may well be applied, "that if an act never has been done, it is a reason why it never should be done." This, it is true, in a proposition susceptible of some qualification. For, if a new injury or case should arise, some special action should never be wanting. The *dictum*, therefore, must be applied only to cases which have happened. Now, then, is this a new case? If not, it would long since have been resorted to as a means to obviate the objection against the court of chancery, that it was so feeble that it could not enforce its own decrees.—The want, then, of an example is enough to show it could not be done; for it has always been convenient and desirable that such a procedure should have been adopted. But that it could not, seems to have been strongly intimated by this court in the case of *Phelps v. Bryant*, where, in an action on a decree made in Connecticut, the bench asked the counsel if a bill in chancery was not the proper remedy? And though the decision turned on the question, *it is certainly in favor of our position. As, how- [*25] ever, there is no express determination on the matter, we may be allowed to investigate it on principle, and see how far such an action can be warranted. Against it there seems a reason that is incontrovertible, arising from the nature of the court and system of our law. The rule of procedure in the latter is *secundum legem et consuetudinem terræ*; that of the former *secundum æquum et bonum*. The principles, therefore, on which a decree may be founded, are not such as would authorize a judgment, and consequently, a decree cannot raise any presumption

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of a legal demand. Nay, the very reason for going into equity is, that the party is remediless at law. The decree does not alter the nature of the claim. It still remains a mere equity, and a mere equity is not a ground of action. Litt. sec. 332. 2 Wils. 86.(a) It only shows there was an original equity, authorizing a recurrence to chancery, in which court the decree ought to be enforced. But allowing the suit to be maintainable, it ought to be only for payment of a specific sum, without any acts to be done by the plaintiff. Otherwise, where a sum is ordered to be paid to one party, and he decrees to do certain things, he may resort to a court of common law for the money, produce his decree without ever showing performance, and ensure a recovery. If, however, the court should think such a suit as the present may be brought, though the decree contain acts to be done by the plaintiff, then it is presumed such acts ought, in the particular case, to be deemed conditions precedent, though strictly and technically speaking they may be independent. This is necessary, because the court cannot annex any conditions to the decree. For the equitable considerations on which it was founded, cannot be exercised by a court of law. The case affords no evidence that the plaintiffs had performed the acts by them to be done.

LIVINGSTON, J. I tried the cause, and refused to nonsuit the plaintiffs because there was a decree ordering only the payment of a sum of money.

Hopkins. I shall show that the decree notices other papers and proceedings, ordering various acts. The interlocutory order and report contain reciprocal acts to be done,

(a) *Preston v. Christmas.* In which it was decided, that as an equity of redemption was a legal quantity, it could not be pleaded by way of accord and satisfaction in debt on a bond. But *quære* how this case will stand with the decision in *Walters and others v. Stewart*, 1 Caines' Cas. in Err. 47, and *Thorp v. Thorpe*, 1 Ld. Raym. 662, that a release of an equity of redemption is a good consideration for an assignment at law.

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and the decree refers to them. The manner in which it is drawn up, omitting those things, does not make them the less a part of the decree, and in enforcing it they ought to be regarded. They should, then, have been averred. The mere averment that the money is *due [*26] and owing, is not sufficient. Besides, the decree, as it is called, is not a final one. It does not appear it was entered in the book required by law. It leaves the matter again to be litigated. A cross bill must be filed to get at the defendant's rights. Therefore, allowing an action to be maintainable on a decree, it cannot be so on this, which is not final. This will be more evident if we consider there are acts prescribed to be done by the defendant. You cannot split the decree and sue for a part; go for the money, and not for the acts. By this mode we may be sued for the debt at law, and called on for performance in chancery. This would be multiplying suits in contradiction to all rule. Another argument against the plaintiff is, that the money is due in different rights; a portion to Post, and a portion to La Rue.

D. B. Ogden, contra. It is a universal principle that debt can be maintained on any judgment of a court of record. Therefore, I shall establish that a court of chancery is such a court. Doct. & Stud. 19, in enumerating the courts of record, mentions chancery as one. So 3 Bl. Com. 24, defines a court of record to be "a court where the judicial acts and proceedings are enrolled in parchment for a perpetual memorial and testimony." If, from principle, it can be evinced that this action will lie, it is not necessary to show a precedent. But even the test required is not wanting. In 7 Went. Plead. 95, a declaration on a decree in chancery will be found.

It is declared, 1 Har. Ch. Prac. 636, (428 of the 8th edition by Parker,) that a decree is of the same force and effect as a judgment.^(a) So *Martin v. Martin*, 1 Ves. 214. *Ma-*

(a) As to personal estate.

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son v. Williams, 2 Salk. 507. Allowing the court of chancery in England not to be a court of record, that of New Jersey is, by the express words of the statute, referred to in the case. But whether it be so or not, is immaterial to the question. It is settled that judgments in other states are no more than foreign judgments. See *Hitchcock & Fitch v. Aicken*, 1 Caines' Rep. 460. By the common law, no court out of England is a court of record. For in actions on judgments in a court of record, the plaintiff must declare *prout patet per recordum*; the trial is by inspection, and the record conclusive. But in an action founded on a judgment of a foreign court, the declaration need not be in that form, the cause is tried as other issues, and the judgment only *prima facie* evidence of the debt. The difference between actions on domestic, and those on foreign judgments, is still more evident, when we consider that on the first, debt alone can be maintained; on [*27] the latter *assumpsit* will lie. Then, as the *present is a foreign judgment, on which *indebitatus assumpsit* may be brought, and as wherever that action can be supported debt may be restored to, this suit is properly instituted, not on the judgment *eo nomine*, but on the debt created by that judgment. For the law implies a promise by every man, to satisfy whatever the law of the land orders him to pay. Still more so when the party against whom it is given, is the very person at whose suit it is pronounced. Whether the decree be final or not, is a question for the court in New Jersey. This, the chancellor of that state has determined, by affording his signature in conformity to the act referred to in the case. The point, then, is settled by a court of competent and exclusive jurisdiction; therefore, not examinable here. By this the sum due is joint. It is said, and truly said, by the defendant, that the suit must be on the final decree. By this it is made a gross debt, of which the plaintiffs are tenants in common. The interlocutory order merely settles the several interests of the joint proprietor. If the defendant

has a right to demand certain acts from the plaintiff, he has a remedy for non-compliance. Therefore, as the suit is on the debt arising from an implied promise, of which the judgment is only evidence; as by the decree a joint demand is created, and the defendant may have redress at law for non-performance on our side, the action is well brought.

Hopkins, in reply. Though it be a settled rule that debt will lie on the judgment of a court of record, the position is true only with relation to such courts as were so when the principle was adopted. We must, then, consider what was the nature of those courts, and the proceedings in them. If any should now be erected into courts of record, which do not correspond with those previous to the rule, the principle will not apply. This brings me back to what I set out with, that a mere equity, the subject of a decree, is not a ground of action at law. The quotation from *Har. Ch. Prac.* means no more than that in settling encumbrances on property, chancery will consider a decree as giving a lien equal to that of a judgment at law. Nor does the precedent cited make against my position. The English chancery has two courts. That of equity, and the petty bag. The latter proceeds according to common law, and the pleadings in *Wentworth* might have been on a decree rendered there. The final decree, as it is termed, cannot make that a joint interest which at law is separate.

SPENCER, J. The counsel for the defendant has argued, 1. That this was not a final decree, but a mere interlocutory order in its nature, *the performance [*28] of which might be compelled by process of contempt there, but which this court cannot perceive to be a judgment in the cause: 2. That the agreement on which the order was made, was out of the ordinary course of the powers of solicitors, and no authority appearing for making it; as the defendant denied that it was made by his autho-

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rity or permission; 3. That it now appears by the documents produced, that the sums declared for by the plaintiffs, if due at all, are not due to them jointly, but that a part is decreed to one of the plaintiffs, and a part to the other separately, and for causes and considerations which have no connection with each other, and for which, therefore, they cannot join; 4. That if, in any case, this court could sustain an action upon a decree of a court of equity, it could only be on a decree for a specific sum of money merely, and not upon a decree enjoining mutual and specific performances like the present; or if an action were to be sustained on a decree ordering mutual performances like the present, then, to effect the ends of justice, the court must consider all things which the plaintiffs are to perform as conditions precedent; and, of course, that the plaintiffs must show the performance of them on the trial; 5. That no action at common law will at all lie to enforce a decree of a court of equity.

The first objection is unfounded in fact. The clerk of the court of chancery has certified the decree as signed by the chancellor, and remaining of record in the office of the clerk. It purports to be a final determination of the cause, and we are to intend that it has been duly entered agreeably to the regulations of the act.

As to the second objection, it merits little consideration. Solicitors of the court of chancery, as well as attorneys in courts of law, are not only responsible to their clients for betraying their trusts, but they are amenable to their respective courts in a summary way. If this had been an action depending in a court of common law in New Jersey, and the attorney had confessed a sum of money due to the adverse party, it could never become a matter of inquiry in a suit on the judgment, whether the attorney had acted by authority. If, in this case, the defendant's solicitor was unauthorised to enter into the agreement on which the decree was ultimately founded, it was examinable only in the court having original jurisdiction. It is to be intended

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that the solicitor acted by the direction of his client, and for his benefit.

*With respect to the third and fourth excep- [*29] tions, it does appear, by an interlocutory order in the cause, that the present defendant was decreed to pay several sums of money to La Rue solely, and other sums of money, for costs, to Post and La Rue; but the final decree, which is the basis of this action, adjudges and decrees all the moneys to be paid by the present defendant to the present plaintiffs, without any act to be done on their part; and thus it turns out to be a decree for a specific sum of money, independent of any condition or precedent act to be done by the present plaintiffs. It follows, that there were no acts to be averred or proved by the plaintiffs, to entitle them to call on the defendant to perform this decree.

The last objection, that no action at common law will at all lie to enforce a decree of a court of equity, remains to be considered.

This point has never been judicially decided; or if it has, neither the counsel nor the court have been able to find such decision. The silence of our books on the subject, is by no means conclusive that an action at common law is not sustainable on a decree for the payment of a specific sum of money, as the present is. Principles established in analogous cases must, therefore, be resorted to, to test the question. It has been said that a court of chancery is not a court of record. This is undoubtedly correct, technically speaking. But whether it be or be not a court of record, by no means decides the question that a suit may not be founded on its final decree. In *Walker v. Witter*, Doug. 6, Lord Mansfield says, "the difficulty in the case had arisen from not fixing accurately what a court of record is in the eye of the law; that description is confined properly to certain courts in England, and their judgments cannot be controverted; foreign courts, and courts in England, not of record, have not that privilege." Yet, under that limitation, actions can be brought on the judg-

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ments of courts not of record by the municipal laws of the country in which the action is instituted. The case cited establishes that where *indebitatus assumpsit* can be maintained, debt will lie; and that *assumpsit*, as well as debt, can be maintained on a foreign judgment; and I agree with Sir William Blackstone, that it is implied by the fundamental constitution of government, that every person is bound, and hath virtually agreed to pay, such particular sums of money, as are charged on him by the sentence, or assessed by the interpretation of the law. What-
 [*30] ever, therefore, *the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge. 3 Bl. Com. 160. Upon the same principle an action of debt can be maintained for a forfeiture imposed by by-laws, and the ordinances of a corporation. The same reason applies to suits on penal statutes. In 7 Went. 95, is a precedent of a declaration in debt in a court of common law, for a sum of money decreed by the Lord Chancellor to be due to the plaintiff, and it is attributed to Mr. Tidd. This is not a high authority; because bad declarations may be drawn by eminent counsel; but Mr. Wentworth's system is deservedly in high reputation.

I should incline not to maintain an action at law on a decree of a court of chancery of another state, if by the decree mutual acts were to be performed, unless the party suing averred and proved a performance of all the acts incumbent on him to perform: because, to sustain the suit without requiring such averments and proof, would be administering justice in a very partial manner. Viewing the decree in this cause to be for the payment of a specific sum of money, unconnected with any condition, I can see no valid objection to sustaining the suit, and more especially as, in the state of New Jersey, it had all the effect of a judgment of the supreme court there. In my opinion the defendant can take nothing by his motion. It may be said that, agreeably to the case of *Hitchcock and Fitch v. Aicken*, decided in this court, the defendant might have impeached

the justice of this decree, in which case this court would have to exercise a chancery jurisdiction. Suffice it to say that this objection does not exist in the present case, and that in suits here, on foreign judgments, the same difficulties might present themselves, of an examination into the local laws of a country, with whose jurisprudence we might be unacquainted. The case I have last cited does not warrant the conclusion, that where parties have had a trial in the court of a sister state on the merits of a cause, that in a suit here, on such judgments, the original ground of action may be gone into, and I cannot assent to the position that in such cases, the justice of a judgment can be impeached.

LIVINGSTON, J. The objections taken on the trial were, on the argument here, substantially reduced to the following:

1. That an action of debt will not lie on the decree of a court of equity, or, at any rate, only in cases where a specified sum of money is decreed to be paid, and nothing more is ordered to be done by either party.

*2. That this is not a final decree, but only an [*81] interlocutory order; and,

3. That the plaintiffs had no joint cause of action.

The two last objections will be first disposed of.

On what pretence can this be called an interlocutory order? It has every property of one that would be deemed final in our own court of chancery. It directs how the costs of suit are to be paid, and reserves nothing for further decision. It is also signed by the chancellor, and, as it is but decent to presume he understood his duty, we must conclude it is signed, as directed by the laws of his state, after having been properly entered in a book by the clerk for that purpose.

As little weight is there in the objection which is made to the right of the plaintiffs joining in this action. How the sum decreed to be paid is to be divided, is a matter between themselves, but that they have a right to join in

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its recovery will be evident from a moment's attention to the decree. It directs the complainant, who is defendant here, to pay *both* of the defendants, Post and La Rue, who are the present plaintiffs, the several sums for which they now sue. Nor does it appear, from the final decree, that this is due to them in distinct rights, or in different proportions; and if that may be inferred from any previous proceeding in the cause, we are not bound to look into it. The chancellor undoubtedly had a right to decree the money to be paid to them *jointly*, and having done so, they could have no other than a joint execution, nor could they have brought separate suits for it. The form of action, therefore, is not only right, but it is the only one which could have been adopted.[1]

But if both these difficulties are surmounted, debt, it is said, will not lie on the decree of a court of equity. In examining this point, I shall take it for granted, as is truly the case, that this decree is for the payment of money only. A mere equity, it is alleged, is no ground of relief at common law, and that the objects of equitable and legal jurisdiction, being so very different, it is impossible the former can be enforced by the tribunals of the latter. This may be correct in the first instance; but, after the original ground of complaint has been litigated and determined in chancery, why should not its decree, or judgment, if for the payment of money, be the ground of an action at law, as well as the judgment of any other court? That we have no precedent of this kind is easily accounted [*52] for. Decrees in equity *are more generally for the performance of certain acts, to which common law courts cannot compel obedience, and therefore the successful party can, in such cases, obtain execution only out of the same court.[2] Even actions on foreign judgments

[1] Of the parties to the action, those who are united in interest, must be joined as plaintiffs or defendants. Code, s. 99.

[2] The distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished. Code

are not very common; because executions are generally issued out of the courts in which they are rendered against the property or person of the party, or proceedings are had against the bail. No case can be produced in which it has been decided, that a court of law will not sustain a suit of this kind. That these courts have been unwilling to lend their aid to enforce the performance of decrees in equity, may be conceded; but such jealous conduct neither proves their want of right or power, nor is it deserving of imitation. And yet, with all this hostility, for it deserves no better name, towards a domestic tribunal, the British courts received as binding and conclusive the sentences of foreign admiralties, the judges whereof were governed by no settled or known rules, but by instructions of their respective sovereigns, which fluctuated according to the exigencies of the times, or the temper and views of those in power. They regarded these sentences as not only binding the property and securing the vendee, which was right, but as deciding, in the last resort, questions arising between third parties, who were no parties to the suit, and whether the same had been litigated or not in the admiralty. If this be law in Great Britain, as it certainly is, her courts of common law would hardly say, without being very inconsistent, if the question were fairly to arise, that they would not regard, at least as *prima facie* evidence of a debt, a decree of the lord chancellor for the payment of money, when both parties had been heard before him, and no complaint was made of his decision. Lord Kaimes, in his Principles of Equity, in speaking of suits which may be sustained on foreign decrees, makes no distinction between chancery and common law judgments, nor is any distinction to be found in the constitution of the United States. Debt

of Procedure, s. 62. Although the Code has abolished the distinction between legal and equitable remedies, it has not changed the inherent difference between legal and equitable relief. *Fritz v. Hepburn and others*, 5 How. 188; *McMaster and others v. Booth*, 4 How. 427; *Hill v. McCarthy*, 3 Code Rep. 49.

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usually lies for a sum due by certain and express agreement, where the *quantum* is fixed and specific, and does not depend upon subsequent liquidation. 3 Bl. Com. 154, 158. Now as every man is bound to pay whatever is assessed on him by the interpretation or sentence of law, such sum when ordered to be paid, instantly becomes a debt, and the party has a right to institute a second action to recover it. *Ib.*, 159. If even an amercement in a court leet or court baron, which are among the lowest order of

courts, create a debt for which this action will lie,

[*33] *it would be extraordinary indeed, if the sentence of the highest court in a state did not raise an equal obligation, or sanction a remedy of the same kind. An obligee who has lost his bond may be driven into chancery to establish his demand, but when that court has decreed the obligor to pay the amount due, why should the complainant be put to the trouble of going a second time through a court of equity, in another state, to recover it? What is he to do if, as may well happen, there be no court of that kind in the state where his debtor may happen to be, or why should not a court of law pay as much respect to such a decision, which has liquidated and adjusted the demand, as to the judgment of any other court, without regard to the intermediate modes of proceeding. The one as well as the other furnishes abundant and equal evidence that the sum demanded is due, and ascertained, which is all that we want to know. I doubt whether it was ever before heard, that the foreign tribunal, which is applied to for redress, must inquire into the nature of the jurisdiction, or the manner of proceeding, of the court whose judgment it is thus called on to support.[1] Shall we refuse to sustain

[1] Debt lies on a judgment fairly and regularly obtained in another state, before a court having jurisdiction of the subject, and of the person of the defendant; such a judgment, since the decision of the Supreme Court of the United States, in *Mills v. Duryee*, (7 Cranch Rep. 481,) being regarded not as *prima facie* evidence merely, but conclusive evidence of a debt of record; *Andrews v. Montgomery*, (19 J. B. 162;) and the proper plea in such action

an action on a French judgment, because the modes of proceeding in France conform to the civil law; or of a court in Holland, because its judicial forms may vary from our own? If the sum be adjusted by a court of competent jurisdiction, and before which both the parties have been heard, it is sufficient. Beyond this our inquiries ought not to extend. I lay no stress on the statute of New Jersey, which renders a decree in chancery of equal effect with a judgment of its supreme court; because, for the purpose of this action, we are not bound to take notice of the manner of proceeding in a foreign court of equity, even admitting, which we do not know judicially, that they are the same as with us; it is enough that it has settled what is due from the one to the other of the parties litigant. But if I had the smallest doubt of the propriety of this suit, this statute would remove it; for if it mean any thing, it must be, that in future, there shall be no difference in any respect between a common law judgment and a decree in equity. The difficulty which may occur, if it should be necessary on a trial to open a decree, with me creates no embarrassment. Why anticipate that a defendant will in any case be able to satisfy us that a foreign sentence or judgment ought to be opened? Notwithstanding our decision, in *Hitchcock and Fitch v. Aicken*, it will hardly be considered as a matter of course *to go [*34] into an examination of the original ground of controversy. When a decree is opened on the principles of this case, it will be time enough to determine whether the party can proceed at law, or shall be non-suited. This is a case after verdict, and no attempt being made, at the trial, to impeach the verity or justice of the decree, why shall we now presume, and that without any suggestion on

of debt is *nul tiel* record. *Ib.*, contra. *Hitchcock v. Fitch*, 1 Caines R. 461; *Hubboll v. Conodrey*, 5 J. R. 132; *Taylor v. Bryden*, 8 J. R. 173; and *Pawlings v. Bird's Exrs.*, 13 J. R. 192, which, so far as they contradict the principle of the case of *Mills v. Duryee*, are overruled. See, also, *Borden v. Fitch*, 15 J. R. 121; *Shamway v. Stillman*, 6 Wend. 447.

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the defendant's part, that it was in his power to have done it?

It will be expected that we take notice of another objection, which is, that something else besides the payment of money is contained in the decree. Were that the case, it would only give rise to a question, how far the plaintiffs should aver performance of the matters directed to be done by them? For, with such averment the action might still be sustained. But it so happens, that the final decree, on which this action is brought, does not order a single thing to be done, except the payment of the two sums of money which constitute this debt. The chancellor, therefore, must have been satisfied that everything he had previously directed the present plaintiffs to do, was performed. But, if we look into the antecedent interlocutory orders, which very unnecessarily make part of the case, and with which we have no business, (for we are not sitting here as a court of appeal or review,) we shall find that all the matters of any consequence there directed to be performed, are enjoined on the complainant himself, who is the defendant here. He is to pay the costs of a suit by Post in the common pleas of Bergen. Also the costs of an ejectment brought by La Rue against Post, together with the fees paid by Post and La Rue, to their solicitor and counsel. His wife is also to execute and acknowledge a deed given by him to Post; La Rue and his wife are then ordered (the performance of which is of no consequence to Neafie) to execute a certain deed to Post. From this view of the interlocutory order it is evident, that as the non-performance of any one of these things must either proceed from his own neglect, or be no detriment to the defendant, it would be idle to insist on an averment that they were performed, or to consider these directions as a bar to the present suit.

My opinion, therefore, is, that the *postea* be delivered to the plaintiffs, and that the defendant take nothing by his motion.

TOMPKINS, J. I concur in the antecedent opinions, and peculiarly so in the present case, as I consider this, so far as it regards the plaintiffs, a decree for the payment of money only.

*KENT, Ch. J. The judgment of the court is according to the opinions delivered, but I dissent from them. In the examination, however, of this case, I shall confine myself to a single objection made to this suit; which is, that an action of debt at law will not lie to enforce a decree in chancery. This objection appears to me to be insurmountable and decisive. It will readily be admitted that there are various kinds of decrees in chancery, which cannot be the ground of a suit at law. Such, for instance, as decrees for specific performance, or those which contain multifarious matter, or involve facts and conditions to be performed by each party. But the present case is supposed to be free from any such difficulty, as it appears to be a final decree for the payment of a sum of money, without any condition or qualification annexed. The present objection, however, does not depend upon the nature of the decree in the given case, but it rests on an established rule, that a court of law will not recognise a decree in chancery as the ground of a suit, or of a plea. No instance has been shown of such an action, and the universal silence in the books affords a strong presumption that the action will not lie. Litt., sec. 108. But there is stronger evidence of the law than that which results from the want of a precedent. It is the settled doctrine that a decree in chancery is equal to a judgment at law, and executors and administrators, are bound equally to regard it in the distribution of assets, yet it is very clear that they cannot plead it, or give it in evidence, in a suit of law. *Jones v. Bradshaw*, cited in Cas. temp. Talb., 223, 224. Why this is so, says Lord Talbot, I do not say; but it is certain that so it has been uniformly held, and the consequence is, really, that the decrees of the court of chancery are considered as no-

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thing : but the opinion of that court, as he continues to observe, has been different ; and chancery will, by injunction, or otherwise, uphold and give efficacy to its decrees, as being of equal obligation with judgments at law. 3 P. Wms. 400, n. F. *Morris v. The Bank of England*, Cas. temp. Talb. 218 ; 4 Bro. Parl. Cas. 287.

The steady resistance which the court of chancery met with from the courts of law during the growth and progressive enlargement of its jurisdiction is probably one cause of the rule which is here mentioned. The Earl of Nottingham in the case of *Colston v. Gardner*, 2 Ch. Cas. 43, complained that the judges of the common law were severe, and unwilling to support or assist the proceedings of chancery : and he refers to some of their "desperate"

resolutions, of which many may be found in the [*36] reigns of Elizabeth *and James. *Brograve v. Watts*,

Cro. Eliz. 651, and others. If a decree cannot be pleaded to a suit at law, it follows that it will not support such a suit ; for it would be an act of inconsistency in the courts to take cognizance of it in the one case and not in the other. A court of chancery, on its equity side, is not, strictly speaking, a court of record. 4 Inst. c. 8. Its jurisdiction and proceedings were originally considered as being confined to cases resting entirely in equity and good conscience, and where the party was without remedy at law. Its decrees were considered as operating only *in personam*, and that they did not bind the lands or chattels. Until very recently, this was with us the regular and direct operation of the decree, notwithstanding the remedy by sequestration had been so long established, and the lands were affected only by proceeding to sequestration, as for a contempt. *Bligh v. Durnley*, 2 P. Wms. 621.

The reason why the courts of law would not take cognizance of decrees is, therefore, to be deduced from the history and peculiar jurisdiction of the court of chancery ; and although the reason of the rule may not now be applicable to some of its decrees, yet we are not at liberty at

this day to set aside the rule. We are bound to declare the law as it has been handed to us, and the symmetry of our system of jurisprudence will be best preserved by resisting innovation. The plaintiffs are not without remedy in the present case, since our court of chancery is the proper tribunal for them to resort to; and for this we have an authority in *Morgan's Case*, in the time of Lord Hardwicke, 1 Atk. 408. In that case a Welsh court of equity had decreed payment of a legacy, and the defendant, to avoid execution of that decree, fled into England. A bill was filed before Lord Hardwicke, stating the proceedings and decree in Wales, and the flight of the defendant, and the chancellor sustained the bill after demurrer, holding that an original independent decree might be had in that court for the legacy.

But if a suit at law will not lie upon a decree of our own court of chancery, the objection applies with much greater force to the decree in the present case. For, after the decision in *Hitchcock and Fitch v. Aicken*, 1 Caines' Rep. 460, November term, 1803, we are not to consider a decree in New Jersey as of absolute obligation, but only *prima facie* evidence of such an equitable demand, which presumption the defendant may be permitted to rebut, and on certain grounds to open the merits of the controversy. To sustain a suit on such a *decree may, therefore, in- [*37]volve this court in the discussion of a wide field of equitable jurisdiction, and in the exercise of which its powers might be found to be wholly inadequate. This difficulty would of itself be sufficient to bar the present action: for it would not be fit and proper that this court should assume cognizance of a cause, if it be not competent to meet the questions that may arise upon the merits, and afford the requisite relief.

But it is said, that by an act of the legislature of New Jersey, a decree in chancery has the force, operation, and effect, of a judgment at law, and is to be enforced by sequestration, *fi. fa.* and *ca. sa.* This fact, however, cannot

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make any alteration in the case, and that for several reasons. It does not obviate the difficulty arising from the last objection I have taken; for foreign judgments and decrees are equally examinable here. Nor did the act probably intend anything more than to make decrees a lien upon the property, in like manner and effect as judgments. It did not mean to confound the jurisdiction of courts of law and equity, nor interfere with the rules by which they were respectively governed. But whatever might be its intention and effect there, that statute has no operation upon the established principles of our own jurisprudence.^(a)

For these reasons I am of opinion that the present action is not maintainable.

THOMPSON, J. I concur in the last opinion, on the ground of our decision in *Hitchcock and Fitch v. Aicken*. Were it not for the principles of that case I should be rather inclined to think an action would lie on a decree, where nothing but a simple debt was to be paid. But as the determination cited, places the judgments in sister states on the same footing as foreign judgments, it would allow of opening the decree and showing the consideration on which it was pronounced. This might lead us to equitable discussions; for, if the decree is to be opened at all, I know not where we are to stop. There is no point or rule to direct or govern. A court of law, therefore, might not be competent to give the due relief. For this reason, I think the defendant ought to take the effect of his motion.^[1]

Judgment for the plaintiff.

(a) In the Circuit Court of the United States, for the district of Connecticut, an action was brought on a decree of the equity side of the superior court of that state, for the payment of money. On demurrer to the declaration, Chase, J., ruled that an action at law would not lie upon the decree. *Stover v. Hinkley*. But Lord Ellenborough has decided, that on a decree of a foreign court of chancery, directing the payment of a sum certain, *assumpsit* might be maintained; *aliter*, when the amount is not ascertained. *Sadler v. Robins*, 1 Camp. 253.

[1] A suit cannot be maintained here on a judgment obtained in a justice's

Murray v. Fitzpatrick.

***THE SHIP NANCY, MURRAY, owner, against [*38]
FITZPATRICK.**

The mayor's court of the city of New York is a court of general jurisdiction, and therefore it is not requisite to allege that the cause of action arose within the limits of the city and county of New York. A misrecital of the title of a statute in a part which does not alter the sense, when its date is truly set forth, cannot be shown as error, or, after verdict, alleged in arrest of judgment. If, under the law authorizing the arrest of ships, the residence of the owner be put in issue, and found against him, it cannot be urged for error that the declaration did not aver the owner to be a non-resident. Under the same act a plaintiff may recover beyond the amount of his bills annexed to his declaration, if the sum be within the damages laid, and costs may also be recovered. The judgment against a vessel proceeded against under the above law, is, "that she remain liable," &c., and whether she is to be sold or not, is for the court below. A person claiming to be the owner, may come in and plead in an attachment against his vessel, without entering an appearance, or filing bail; and a verdict, on an issue to his plea, and judgment thereon is good.

IN ERROR from the mayor's court, on an attachment by the now defendant against the ship Nancy, under the act of the 10th of August, 1798, "authorizing the arrest of ships or vessels, for debts contracted by the master, owner, or consignee, for and on account of such ships or vessels, in this state."

court in a sister state, unless the statute organizing such court, be shown; if, on the statute being proved, it appear that the subject matter of the suit was within the jurisdiction of the court, and that the proceedings were had in conformity to the statute, the judgment will be entitled to full faith and credit. *Thomas v. Robinson*, 3 Wend. 267.

No action lies upon a judgment obtained in another state against a person resident in this state, in an action commenced by the service on the defendant, while in this state, a rule to show cause; such service being void as well on general principles as by the statute, (sess. 22, c. 8.) although the rule to show cause was in the nature of a *scire facias* to charge the defendant *de bonis propriis*, grounded on a judgment obtained against him, in a representative capacity. *Fenton v. Garlick*, 8 J. R. 194. An action cannot be sustained on a judgment in another state, recovered in an action commenced by an attachment of goods without any personal summons or actual notice to the defendant. *Kilburn v. Woodworth*, 5 J. R. 37. And the principle is the

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The declaration contained two counts against the vessel in actual custody of the sheriff of the city and county of New York, alleging in the first, the work and materials furnished to amount to 96 dollars and 36 cents, and in the second to 9 dollars and 48 cents, and in both, that they were so afforded at the request of her captain, who promised to pay what they were reasonably worth, with the common averment, and notice, &c., annexing bills which contained an account of the demand. To this Murray came in and pleaded, 1. The general issue as to the promises; 2dly. That the ship was not owned by a non-resident, but by himself. On these pleas separate issues were taken, and a verdict being found for the plaintiff on each, assessing the damages with interest, and giving costs, judgment was entered "that the said ship or vessel called the Nancy, remain liable to the said John Fitzpatrick, for his damages, &c., and also for forty-five dollars and eighty-seven cents, being &c., which damages in the whole," &c. The plaintiff now assigned for error, 1st. That the verdicts against the ship were rendered upon issues taken to the pleas of John Murray, who was no party to the record, neither appearance nor bail having been entered or filed for him; 2d. That by the common law and custom of this state, no such action could be maintained; 3d. That the declaration did not show the materials, &c., to have been furnished within the jurisdiction of the mayor's court; 4th. That the act was misrecited in using the plural number "masters, owners and consignees," instead of the singular; there being no such act as that set forth; 5th. That the declaration did not aver the ship, at the time when the materials, &c., were

same where the defendant is sued here, as bail in an action commenced in another state. *Robertson v. Executors of Ward*, 8 J. R. 86; *Pawling v. Bird's Executors*, 13 J. R. 192; *Andrews v. Montgomery*, 19 J. R. 162.

No action can be brought upon a judgment rendered in any court of this state, except a court of a justice of the peace, between the same parties without leave of the court, for good cause shown, on notice to the adverse party. Code, s. 64.

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afforded, was owned by a non-resident; 6th. That the jury had assessed damages beyond the amount of the account annexed to the declaration; 7th. That the judgment was futile and nugatory, on which no execution could issue, and gave the plaintiff below no other remedy than he had before; 8th. That costs were given against the vessel for which she was not liable.

**Hopkins*, for the plaintiff in error. It is in vain [*39] to attempt to support a judgment, which is in itself incongruous and utterly senseless. The act cannot be carried into execution by any mode of proceedings in existence; at least not by such as are now before the court. On the point of costs it is silent, none, therefore can be recovered. For the statute giving costs, gives them only where damages were recoverable before. *Wilkinson v. Abbott*, Cowp. 367. The third error is, it is conceived, fatal. In all suits in inferior courts, the cause of action ought to be shown to arise within its jurisdiction. *Trevor v. Wall*, 1 D. & E. 151.

SPENCER, J. That is in cases where the court has a limited jurisdiction as to territory.

Hopkins. If, however, this be otherwise, there is no such statute as that stated. It may not perhaps be necessary to recite a public act, but when attempted, it must be faithfully done. *Mills v. Wilkins*, 3 Salk. 331. *Vander Pluncken v. Griffin*, Cro. Eliz. 236; 1 Com. Dig. tit. *Action on Statute*, 1. These authorities may be thought applicable to proceedings on indictments, and other criminal matters; but the same principle is found in actions on assumpsit. *Mann v. Green*, Cowp. 474. The non-residence of the owner ought to have been averred, as it is of the essence of the action. The law makes this the gist of the suit, and it is upon this only that the statute can be enforced. Com. Dig. tit. *Pleader*, c. 76. The amount of the

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damages ought to be confined to that stated by the bills. It is for this purpose that the act requires the accounts proceeded for to be annexed to the declaration. This was meant to control the damages laid; there is manifest error, therefore, in giving more than are claimed. If it has been intended to cover, by the excess, the interest due, it is still within the reason advanced. The bills do not demand it, and the present case is, by the statute, made essentially to differ from those in which the damages laid are considered as the sum claimed. It may be urged that the verdict has cured some of the faults, and, therefore, they cannot now be relied on for error. The rule is this, when the right or title is set forth defectively, a verdict will cure it; but when a defective right or title is stated, no verdict will cure it. That is, a verdict will cure form, but not substance. *Rushton v. Aspinall*, Doug. 679. Time and place may thus be aided, but not matter. *Butt's Case*, Co. Litt. 308, b. 7 Rep. 25, a. As, therefore, the non-residence is not averred, and the jurisdiction not shown, the judgment must be reversed.

Radcliff, contra. The proceedings in this case are under a special act, creating a mode contrary to the common law, and *adopting a remedy in the nature of [*40] admiralty jurisdiction. They are, therefore, to be construed with the same liberality as that court is accustomed to use. The words of the statute are to the same effect. In the 8d section, the principle of that form is adopted. All persons having demands, are authorized to join in one declaration, the form of which is prescribed. They are to "briefly set forth their demands, allege the work to be done at the request of the owner, master or consignee, as the case really is, averring demand and refusal, and annexing the accounts." The act excludes the necessity of stating either non-residence, or that the cause of action arose within the jurisdiction. But there is another answer to these objections. The law requires that,

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previous to granting the attachment, an affidavit be made stating the fact of non-residence, and that the materials, &c., were furnished where the vessel then is. The presumption, then, must be, that these circumstances have already been shown in that part of the proceedings where it was requisite they should appear. Besides, the now plaintiff has put these facts in issue; a verdict could not have been obtained without their being substantiated, and the finding of the jury is, of course, conclusive that they were proved. I may add, on the point of jurisdiction, that it has been decided, our courts of common pleas have general jurisdiction in all transitory causes. The English decisions are to the same effect. As to the misrecital it is mere surplusage. That the assessment of damages is beyond the value of the account annexed can never be ruled an error; because the damages laid in the declaration are beyond those recovered. With as little reason can the judgment be impeached on account of the costs allowed. The act under which the suit below was instituted, authorizes a reference according to the act for the "amendment of the law," (1 Rev. Laws, 846,) and by that, costs are given. It may be added that our "act to reduce certain laws concerning costs into one statute" (1 Rev. Laws, 528,) was passed after that authorizing the arrest of ships, and that it gives costs wherever damages are recovered. Besides the very act in question (sec. 4,) gives costs against the vessel when liberated, on the claimant's entering into bonds to pay the money for which she may be attached. The suit below rests on positive statute, not the common law. Therefore its form, and the judgment rendered, are to be conformable to the act. It is ordained that the judgment shall be, that the vessel remain liable. The court below can only affirm the rights of the plaintiff there, and order the vessel to remain liable to them. If *the debt be satisfied, the at- [*41] tachment will be superseded, and the ship discharged.

LIVINGSTON, J., delivered the opinion of the court. The

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first error assigned, or at least relied on, is, that it is not alleged in the declaration, that the work was done, or the materials found, within the jurisdiction of the court below.

The mayor's court of the city of New York may hold plea of actions arising in any part of the state, as well without, as within the limits of the city. It is not necessary, therefore, to state that the cause of them arose within its jurisdiction to give it cognizance, any more than if the suit had been depending in this court.

2. The second error is, that the title of the act is misrecited. The words "masters and owners" are in the plural, whereas in the act they are in the singular number.

There is some confusion, if not jargon, in the English books on this point. In some authorities we are told that as the title is no part of a statute, its misrecital is not fatal, but only surplusage. *Chance v. Adams*, 1 *Ld. Raym.* 77; *Attorney General v. Hutchinson & Pocock*, *Hardw.* 324. In others, it is laid down that a public statute need not be recited in pleading, but if a party undertake to do so and misrecite it, the misrecital is fatal. *Vander Pluncken v. Griffith*, *Cro. Eliz.* 236. From other cases, (1 *Cro. Car.* 136, 522,) we find the misrecital of a statute in a material point only, is fatal. *Say & Seal v. Stevens*, *Cro. Car.* 136; *Goodwin v. West*, *ib.* 522; *Creswick v. Rookesby*, 2 *Bulst.* 47, 48; *Crossman v. Churchil*, 2 *Mod.* 99. From other decisions, again, it would appear that if a party, in pleading or declaring on a public statute, conclude *contra formam statuti prædicti*, a misrecital is not fatal; for, as it was not necessary to recite the statute, the judge, although it be misrecited, will take notice of the true contents. *Platt v. Hill*, 1 *Ld. Raym.* 882, *Partridge v. Strange & Croker*, *Plowd.* 79, 84. It is also laid down in another case, that a misrecital of a public statute in a part which does not go to the ground of action, is cured after verdict by the statute of jeofails. *Styles*, 241.

After an examination of these different cases, and comparing them with the one before us, we are warranted in coming to this conclusion; that a misrecital in the title of

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a public statute, in a part which does not alter the sense, and when its date be truly set forth, shall never be a cause for arresting judgment, after verdict, or be assigned as error. Courts are supposed to be acquainted with all public acts, and whether their title be truly or falsely recited, they will be satisfied that such act as the plaintiff or defendant relies on exists, before either party shall avail himself of it. Thus in the present case it is not denied that there is *such a law as the plaintiff has declared on, and [*42] because a clerk has made the plural of the singular number in its title, without, however, in the least altering its sense, it would but little comport with the ends of justice, if not be a slander on the court, to insist on its considering such variance as fatal after verdict. I therefore disregard this objection to the judgment below.[1]

3. It is alleged that it does not appear that the owner of the Nancy was a non-resident.

Whether this objection might not have been valid, if this had not appeared to be the case on some part of the proceedings, I will not say; but when this fact was very properly put in issue below, upon the plea of the party too who prosecutes this writ of error, and it is expressly found that the plaintiff's demand arose while the ship was owned by a non-resident, we should be inexcusable now to listen to this allegation. It may, indeed, be doubted whether the issuing of the warrant and its continuing in force, be not

[1] In penal suits, it is enough to allege an indebtedness accrued according to the statute naming the section, title and chapter of such statute particularly, and indicating the statute by plain and intelligible reference to its subject matter. Per Cur., *People v. Brooks*, 4 Denio, 469. It is not necessary in the count in case to refer to the statute, nor in the count in debt to name the subject matter of the statute, under which the action has accrued, as that it had accrued "according to the provisions of the statute concerning witnesses, &c.," it is enough to name the part, chapter, title, article and section of the statute. *Ib.*

As to the general power of the court to amend, and to the imperfections, omissions and defects, which may be disregarded, supplied or amended, see 2 R. S. 424; 425; also Code 1851, ss. 169, 176.

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sufficient evidence of non-residence. If the ship of a resident were to be proceeded against in this way, surely a supersedeas might be obtained on satisfactory proof of that fact.

4. The damages, it is said, exceed the plaintiff's demand. The jury have allowed interest, as they had a right to do. How, then, does it appear that they have given more than the plaintiff claimed, which, by his account annexed, could only be for the principal of the supplies furnished? But the damages laid in the declaration, which alone we should look at, are greater than the sum recovered.[1] This objection, therefore, fails in point of fact.

5. Costs, it is supposed, ought not to have been allowed; because, if damages are given where none were given before, no costs are recoverable. But is that the case here? Were not damages recoverable before this act, for work done or materials found for a vessel? If the action had been referred, as might have been done under the third section, costs would certainly have been allowed; for the act concerning costs, which passed in 1801, declares that where damages are recovered, the party shall have costs too.

6. The last assignment is, that the ship by the judgment is to remain liable for the damages and costs. If costs ought to have been given, as has been already shown, it is reasonable that they, as well as the damages, should be a *lien* on the property. So, by the fourth section, it is provided that the vessel may be discharged from the attachment, on security being given to pay the demand, [*48] with *costs of suit*. But it was further said, in *support of this objection, that the judgment could not be executed, and should, therefore, be reversed. How the judgment is to be enforced, whether by the sheriff's keep-

[1] The effect of a bill of particulars is to restrict the proofs, and limit the recovery, or set off the matters set forth in it. *Stackweather v. Kittle*, 17 Wen. 20.

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ing the property until the costs and damages are paid, or whether the vessel may be sold to raise the money, are points to be determined in the court below, and not now before us. I should presume the first to be the proper course, and to me it appears a pretty effectual way of carrying into effect the judgment that has been rendered. At any rate, if the judgment be such as the law prescribes, and in my opinion it literally conforms to the act, it is not for us to say it is erroneous, merely because there may be a difficulty in its execution; nor have we a right to render the law a dead letter, because all its provisions are not such as meet our approbation. The legislature intended, as is the case in some other countries, to make the vessels of non-residents liable for certain demands. The present plaintiff has pursued the directions of the act, and we cannot, for any of the reasons which have been assigned, deprive him of the judgment and *ken* he has obtained on the ship in question. The judgment below must, therefore, be affirmed.

Judgment affirmed.

STEVENS *against* THE COLUMBIAN INSURANCE
COMPANY.

Under a policy on freight, the gross amount is, on a total loss, the sum to be recovered.

This was an action, on an open policy, for the recovery of 16,000 dollars, underwritten on the freight, by charter party, of the ship *Swan*, from the *Havanna* to New York. A total loss, and the plaintiff's right to a verdict were admitted; but the defendants contended, that as the plaintiff would, had the vessel arrived safe, have necessarily been put to the expense of wages and provisions, though the whole freight would have been due, so, in case

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of a total loss, the amount of those wages and provisions was what the insurers were entitled to deduct.

The jury having, by consent, found for the full sum mentioned in the policy, it was now brought before the court to determine whether he ought to recover the gross amount as subscribed for in the policy; a specific proportion only, or the actual net freight, after making the deduction insisted on.

T. L. Ogden, for the plaintiff. Freight is the compensation, or hire paid to the owner of a vessel, at the [*44] termination of the voyage, *for the use of his ship.

The contract between him and the underwriter is, that he *shall* receive it notwithstanding any of the perils insured against. In the present case, then, the amount the plaintiff would have to receive, is *that* specified in the charter-party, and *that* sum is the subject of the insurance in the policy on which this action is brought. Upon these principles, what has the underwriter to pay in case of a total loss? The value of the subject insured at the commencement of the risk, as it is settled by his subscription. Practice on other policies shows this. In the case of insuring a ship, a month's wages and provisions are allowed in her outfit. These, if she return safe, are consumed and expended, yet no deduction was ever attempted, because the owner would, at the end of the voyage, receive the bare vessel. If the principle be allowed against the freight, it must equally operate against the body of the ship. Nay, it will authorize subtracting the very repairs that may be required in consequence of deterioration during the voyage. *Shaw v. Felton*, 2 East, 109, is in point to show that the value of the subject insured, as it stood at the commencement of the voyage, is what the underwriter upon a policy to the full amount must pay if a total loss take place. The case was this. A policy(a) was effected on ship and goods.

(a) It was a valued one.

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for an African voyage. The goods were invested in slaves. The vessel sunk in the very port of delivery, but the slaves were saved. The underwriters contended for a deduction to the value of the slaves purchased by the cargo, but the court held the plaintiff entitled to a recovery without any deduction. The principle is, wherever the right to freight has commenced, the whole is due. *Thompson v. Taylor*, 6 D. & E., 478, is stronger than the present. There the insurance was, at and from London to Teneriffe and the West India islands, upon freight under a charter-party, for a cargo of Wine to be taken in at Teneriffe. The vessel sailed and was captured on her way to Teneriffe before she had a single pipe of wine on board, yet the insured recovered without deduction; because, as the right to freight, though inchoate, had commenced, the underwriter was bound to pay all that the insured would have received had the accident not occurred. If this be not the law, the question then is, what must be the measure of deduction? If the seamen's wages and provisions, then in almost every case there must be a law-suit, for in hardly any two will they be alike. Besides, the amount of these for one month is always covered by the policy on the ship. Suppose the vessel captured within *that time, just [*45] on entering her port of destination, so that the voyage would clearly have been performed within the month, must the insurer on freight pay nothing? Even a specific proportion may be far from attaining the ends of justice. In some cases it might be more, in some less, than a compensation.

Pendleton, contra. On this precise point, there being neither any determination nor usage, it must be considered and decided on principle alone. The question is, what ought to be recovered on a contract which is purely one of indemnity? The foundation of all such is the maxim of the civil law, which says no man shall gain by the loss of another. The compensation, therefore, must be no more

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than the injury actually sustained. 2 Marsh. 529 ; 2 Emer. 221. "Insurance is not a lucrative contract; its only object is to indemnify the insured from loss." The receipts on an accident ought to be no more than they would be on safe arrival. The reason why the deterioration and repairs of a vessel are not deducted by the underwriter, from the amount of the policy on a ship, is, that had she returned they would have been actually compensated for by the freight. The insurer, therefore, pays no more than the insured would have received. Vessels and goods have a value at the very outset of the voyage, but freight has none. It does not acquire any till the termination of the adventure, and that is the reason some writers term insurances on this kind of interest wager policies. But what is freight when the voyage is concluded? Nothing more than the surplus, after paying wages and provisions. If, then, on a loss, the insured receive that surplus, and those wages and provisions, he gains by the loss, in contradiction to the authorities cited. This affords a strong temptation to fraud. Suppose a ship insured for an East India voyage, at 20,000 dollars, her freight at 16,000 dollars, of which the necessary charges of pilotage, wages and provisions, amount to 6,000 dollars. The net sum, without any misfortune, would be 10,000 dollars. But if, according to Emerigon, an officious accident intervene one or two days after sailing, the insured would clear within a trifle of 6,000 dollars by the mischance. The court, therefore, will limit the recovery so as to do away this inducement to fraud. To prevent this as much as possible, the French law obliges the assured always to keep, at his own risk, one tenth of the property insured. What is at risk constitutes the only interest in a policy. More than that certainly [*46] ought not to be recovered. Wages are not *at risk, for by a loss they are saved. In cases of bottomry, the lender can insure only his principal, but not his interest; nor can the borrower cover more than the surplus value of his vessel, after deducting the sum ad-

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vanced. In an open policy, freight, according to Millar, 247, means "the actual net freight." Marsh. 467, recognises this idea, in stating the amount freight shall contribute for, in a case of general average. We have adopted the same principle; and, in the case of *Leavenworth v. Dole*, 1 Caines' Rep. 573, settled it at one-half. If the owner is to contribute no more, then he ought to recover for no more. Millar, page 231, states the English practice to be according to the rule contended for. In an insurance on freight generally, a total loss is calculated to be the net freight, or positive gain. Otherwise the insured would gamble for the residue. By referring to Marshall, the case of *Thompson v. Taylor* appears to have been on a valued policy. The arguments, therefore, deduced from it, do not apply. There is no uncertainty in taking an *aliquot* part of the freight as the amount of expenses, because in all cases the proportion will be the same.

D. B. and T. L. Ogden, in reply. The right of deduction contended for is said to be founded on the nature of a policy of insurance, which being a contract of indemnity, all that ought to be asked for is, what would have been received. As a general rule, this is true; but general rules are adopted only as most likely to promote the ends of justice. In some cases, therefore, the one in question is not attempted to be enforced, though the insurer may pay more or less than the injury sustained. In a policy on goods, only prime costs and charges are recoverable, though interest and profits have been lost. Under an insurance on a ship, though she founders at the extreme part of the voyage when greatly deteriorated, the full value, as at the commencement, is paid. *Shawee v. Felton*, 2 East, 109. And this very decision shows what reliance can be placed on Millar, when he lays down what is the English law; for, in page 247, he says it must be "the probable value of the ship at the date of the loss, with expense of outfit." This position of his is at war with all the Eng-

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lish, and with all our decisions. The cases in which freight and ship are valued are those of general average, arising between third persons, and not between assurer and assured. The estimate is made to settle the proportion they are to pay of another's loss, and not the value of their own goods for which they had given a premium. Suppose an insurance on freight, an abandonment, payment, deduction and restoration. Would not the owner of the goods be obliged to pay the underwriter on freight the full amount? This very point now contended for was agitated in Pennsylvania before Judge Washington, and though a usage for the deduction was established, he ruled against it.

THOMPSON, J., delivered the opinion of the court. We think the assured is entitled to recover the gross amount of freight. Although indemnity is the leading object of insurance, it is not always the criterion by which to ascertain the amount of the loss. In an open policy on goods, the rule by which to estimate a total loss is the invoice price, and all duties and expenses, till they are put on board, together with the premium of insurance. After a long voyage, and when the goods had almost reached a profitable market, it might with plausibility be urged, that the above rule would not afford an indemnity; but to depart from it, however reasonable and just it might appear in some cases, would lead to endless uncertainty and litigation. So, likewise, in an open policy on a vessel, her value at the time she sails, with the expense of her outfit and premium, is the rule by which to estimate a total loss. It has frequently, with great propriety, been said, that in matters of commerce the plainest and simplest rules are always best. They are easily learned, and easily obtained, and do not depend on any subtleties and niceties. No general rule giving a specific proportion of the freight could with justice be adopted. It would operate unequally by reason of the great diversity in the distance and expense

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of voyages; and to adopt the net amount of freight as the rule, would lead to much litigation and uncertainty respecting the deductions to be made. But to take the gross amount of freight as the rule of damages, would be equal, simple, and easily ascertained. Mr. Justice Lawrence, in the case of *Shaw v. Felton*, says, the period to look to, in order to ascertain the value of the subject matter of insurance, is when the vessel sails, and not the state of the thing at the time the total loss happens. The case of *Thompson v. Taylor* may be considered, in some manner, as illustrative of the practice in England on this subject. Some doubts have been raised whether that was an open or a valued policy. We think, however, that it is pretty evident it was an open policy. Park, page 36, a, (he was counsel in the case,) in his report of the case expressly so states it, and although it might be inferred from the statement of the case by Durnford and East, that it was a valued policy, yet it is alleged, in the arguments of [*43] counsel, to have been an open policy, and that circumstance is made the basis of some of their reasoning. The question there was, whether the assured's right to freight had commenced, the vessel being under a charter-party to sail from London to Teneriffe, and there take in her cargo, as she had been captured before her arrival at Teneriffe, before taking any of her cargo on board. The court determined that there was an inchoate right to freight the instant the vessel sailed from London, and the assured recovered the gross amount of the freight stipulated in the charter-party. In that case we hear nothing respecting deductions, although the vessel had performed only a very small part of her voyage. Had the practice in England warranted such a claim, it would, doubtless, have been made. Upon the whole, we think, to take the gross amount of freight as the measure of damages is the least exceptionable rule, and most in unison with the acknowledged principles adopted in analogous cases, and not altogether without authority to support it. The opinion of

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the court, therefore, is, that the plaintiff have judgment upon the verdict, of the jury,(a) according to the stipulation in the case.[1]

Postea to the plaintiff.

SMEDES, Executor of HIEISTEAD, against W. P. HOOGHTALING and others, Heirs of P. HOOGHTALING, Deceased.

Interest may be recovered beyond the penalty of a bond. But whether it shall be so or not, is matter of law arising from the facts, and therefore for the determination of the court, not of the jury. Acknowledging a bond, and apologising for not paying it, are circumstances to rebut and destroy the presumption arising from not paying interest for 25 years.

THIS was an action brought in October, 1802, on a bond, dated 4th of June, 1776, conditioned for the payment of 200 pounds, with interest at 4 per cent., on the 4th day of June then next. The defendant pleaded payment, and relied on the presumption of law arising from the lapse of time since the instrument was given. On the trial no evidence was adduced of interest having been ever paid, nor was there any indorsement to that effect on the obligation. From the testimony of a mesne assignee, who was released by the plaintiff, it appeared that the bond had, on the division of the obligee's estate, been taken by the mother of the obligor, as a part of her share in it; that this was done at his request, because "he then should never have to pay it." That the mother herself had declared she "had nothing against the obligor," but did not give a discharge, on being threatened by one of her daughters to be

(a) See ante, p. 16, note (a), the latter part.

[1] A technical total loss of the vessel involves a loss of the freight. *The American Insurance Company v. Center*, 4 Wend. 45; *LeRoy v. Gouverneur*, 1 J. C. 226; *Salus v. Ocean Ins. Co.*, 12 J. R. 107; *DeLonguemere v. The Fireman's Ins. Co.*, 10 J. R. 137; *Davy v. Hallett*, 3 Cal. R. 10.

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turned out of doors if she did. It was, however, in proof, that in *the same year in which the [*49] mother of the obligor made the above declaration, he was called on for the payment, when he acknowledged the bond to be due, and apologized for having suffered it to remain so long unpaid.

Upon this testimony, the jury found for the plaintiff; but a question then arose, whether the interest could be calculated beyond the penalty. A verdict, however, was taken for the full amount, on an agreement to reduce it, in case the court should be of opinion that it could not; but no new trial to be granted on that account.

KENT, Ch. J. This case is submitted without argument. On a review of all the decisions on this subject, the court think this rule ought to be adopted: that interest is recoverable beyond the penalty of a bond.(a) But that the recovery depends on principles of law, and is not an arbitrary, *ad libitum* discretion of a jury. In the present instance, we are of opinion that it is due, and therefore the verdict to remain unaltered.[1]

Judgment for the plaintiff according to the verdict.

(a) If judgment has gone by default, the clerk may, in taxing costs, calculate interest beyond the penalty of the bond. *Moffat v. Barnes*, July, 1802, MS., Kent, Ch. J. The general rule, however, certainly is, that the recovery on a bond is limited by the penalty, though exceptions to it have, both at law and in equity, been sometimes allowed, as where the bond was to account for moneys to be received; *Lonsdale v. Church*, (2 D. & E. 388;) though where it is to indemnify, the penalty, it has been ruled, is the *quantum* to which the indemnification is confined. *Wilde v. Clarkson*, 6 D. & E. 303, in which *Lonsdale v. Church* is disapproved of. Where the plaintiff is kept out of his money by writs of error, &c., courts of law will carry the damages beyond the penalty, (*Bodily v. Bellamy*, 2 Burr. 1094,) a *fortiori* in equity, if the recovery of the debt be delayed by the obligor; *Pulteney v. Warner*, (6 Ves. jun. 92;) *Hale v. Thomas*, (1 Vern. 349,) especially if he be the plaintiff. *Duval v. Terry*, (Show. Parl. Cas. 15.) So, if extraordinary

[1] The condition of a penal bond is the true amount due upon it, as well after as before the day of payment. *Strang v. Holmes*, 1 Cow. 224. A sure-

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LIVINGSTON against DELAFIELD.

If the information of the loss of a vessel be known in a place early in the morning of the day on which the policy is effected at noon, it is not proof of fraud in the underwritten, though it be brought by some of the crew of the ship insured, if it do not appear that they had been on shore. If it be doubtful whether a communication as to the time of a vessel's sailing has been made, a new trial will be ordered to ascertain that fact, especially if, from the amount of premium, it may be inferred that it was not duly stated; but should circumstances render it difficult to establish, on the second trial, the facts well proved on the first, the order for the second will be, on condition of admitting those facts.

On a valued policy upon the body of the ship *Eliza*, Henry Livingston, Master, from Jamaica to New York, opened the 16th of November, 1801, and subscribed by the defendant on the 18th, at a quarter before 12 o'clock, for the ordinary premium of 6 per cent. On the trial, the policy, abandonment, and interest were proved. The latter by a British register, granted at New Providence, in the name of the plaintiff. The other facts, in evidence, so far as they are important to the present decision, were these:

The insurance in question was effected by the order of Isaac Riley, who had shipped on board the *Eliza*, for the outward voyage, a number of horses, driven for him from Connecticut, by one of the ship's crew, named Brainard, who, after sailing in her from Jamaica on the 25th of September, and seeing the vessel founder at sea, in consequence

enforcements are derived from holding money over; *Dunaway v. Plunket*, (3 Bro. Parl. Cas. 261,) or the bond is taken only as a collateral security; *Kerney v. Bligh*, (3 Bro. Parl. Cas. 338,) or the action be on a judgment or a bond. *M'Clure v. Dunlop*, 1 East, 438.

ty is not liable beyond the penalty of his bond; and the rule seems to be the same as to the principal. *Clark v. Bush*, 3 Cow. 151. On a judgment for the penalty of a bond, the plaintiff cannot, by his execution, collect more than the sum mentioned in the condition of the bond, with interest and costs. *Van Wyck v. Montross*, 12 J. R. 354.

of starting a butt in a gale of wind, arrived with another of the seamen belonging to her at New York, during the night of the 17th of November. It did not, however, appear that they had been on shore, and the vessel in which they came was, early in the morning, ordered down to the quarantine ground, as she had passed it the evening before. Nor was it clearly in evidence, that at the period when the policy was opened, any communication was made as to the time when the Eliza sailed, though the broker, through whose intervention it was done, *testified, [*50] that upon his first instructions, on the 16th, to procure insurance for only 2,000 dollars, he immediately advised covering the vessel to a larger amount, which Riley declined, saying he would wait. That on the 18th, Riley called about ten o'clock in the morning and desired 2,000 dollars more to be effected, and on hearing the increase of premium a few days might occasion represented, as the vessel was out of time, was induced to give directions for 3,000 dollars to be procured. That Riley staid three quarters of an hour in the office, and then went away, upon which the witness took the policy to the Coffee-House, opened it again, and instantly after the defendant had subscribed, the news of the loss of the Eliza was brought in. That he communicated this about one o'clock to Riley, whose countenance did not betray any consciousness of fraud. That he advised Riley to make the defendant an offer of examining the persons who arrived. On reading a written memorandum, handed to the witness to refresh his memory, it turned out to have been made in his office, by Riley, on the 18th, specifying the sailing of the ship to have been about the 3d of October, according to which the witness swore, he believed his representation on that point to have been made to the first underwriter, by a written order for insurance, shown on the 16th and delivered to the defendant when payment was demanded. The memorandum read contained a detail of Riley's transactions on the 18th of November; from which he appeared to have

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been occupied, till the moment of receiving the account of the loss from the broker, in quarters of the town where the news had not arrived. But it was in evidence that Riley had been for some time in the habit of calling every day, about 10 o'clock, A.M., at the office of one Lang, a printer of a daily paper, in great repute for the marine information it affords, to inquire for ship news; that intelligence of the loss of the Eliza had been received there very early on the morning of the 18th; that Riley, on that day, did not call till near two o'clock in the afternoon, and then requested Lang to take notice he had not called that morning. There were some slight circumstances tending to show that Riley was the person actually interested in the vessel.

On this evidence, the judge charged the jury that payment was resisted on two grounds: 1st. Because the assured knew of the loss previous to the insurance; 2d. Because the time of the vessel's sailing was not disclosed to the defendant, by which she would have appeared [*51] a missing vessel. As to the first, it was a *principle of law that fraud should not be presumed, though it might, as other matters, be established by circumstances. It was not proved positively that Riley knew of the loss before the insurance was made. From the arrival, in this port, of the two men belonging to the crew of the Eliza, the night before it was effected, it did not necessarily follow that Riley knew of the loss, there being no evidence of their having come on shore. Upon the whole, he was of opinion that the proof on this point was not satisfactory. As to the second point, he said, he had considerable doubts. He rather thought the broker mistaken, as to his having communicated the time of sailing to the first underwriter on the 16th. There was pretty strong proof of this in Riley's memorandum, from which it appeared that he himself did not know when the vessel sailed, until the 18th of November. Upon this charge, the jury brought in a verdict for a total loss, to set aside which the defendant now applied on the following grounds: 1. When the parties

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live in the same place, if the assured might have known of the loss in the usual course of business, such knowledge must be presumed until the contrary be shown by evidence on his part. In the present case, it might have been so known, besides particular facts from which it might be presumed; 2. The vessel being admitted to be greatly out of time, proof of the time of her sailing, and that other vessels had arrived, and brought the assured intelligence of her having sailed before them, ought to have been communicated to the defendant; 3d. That it was the duty of the broker to have communicated it (if he knew it,) is not sufficient evidence to found a presumption that he did so.

Pendleton, for the defendant. Facts may afford grounds to presume fraud. The retaining possession of goods by a vendee after an absolute sale, is one out of many other instances. The arrival, on the 17th, of a man in New York, who belonged to the vessel, and had driven the horses she had carried for Riley, together with his peculiar conduct on the 18th, at the printing office of Lang, are sufficient to induce an inference that he knew of the loss of the *Eliza* before the defendant underwrote. Positive proof of knowledge is not required where there is a general report of a fact. In such cases the rule is, that slight evidence, or, as *Roccus*, Not. 78, expresses himself, *semi-plena probationes*, shall be enough. These he defines in the same place to be *conjecturae, praesumptiones, et indicia*. In 2 Emer. 124, 125, 130, 133, the principle is recognised, and many authorities cited to the *same effect. Do not, [*52] then, the circumstances here amount to these *semi-plena probationes*? In *Stewart v. Dunlop*, (Park, 209,) there was no actual evidence of the assured's having known of the loss of the vessel insured, yet it was presumed, merely because a person had arrived, who had brought the intelligence, and communicated it in the city. In *Da Costa v. Scanderet*, Park, 179, the suppression of a doubtful account of a vessel, like that of the assured's, being taken, was

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ruled to be a fraud. Upon the second point there can be no doubt. The time of sailing could not have been communicated, for it appears that though the vessel was greatly out of time, she was, notwithstanding, underwritten at only the ordinary premium. This is a sure criterion to determine the nature of the representation made. *Purson v. Watson*, Cowp. 785.

Johnson and Hoffman, contra. The principles relied on are applicable only to those frauds which arise from presumptions *juris et de jure*, and are the effect of positive institution, against which no proof can be allowed. 2 Emer. 139. It is for this reason, that, when the facts are ascertained, the judge, according to the code in which those rules subsist, pronounces whether the circumstances amount to fraud or not. The very origin of these regulations is sufficient to induce their rejection by us. They are selected from the ordinances of various codes, and were founded, according to Pothier, No. 21, on the rareness of good faith among men, and the difficulty which the insurer sustained in proving a positive fraud. Millar, page 75, states that they are of no authority in the English law. And, even in the very system where the positions laid down for the defendant are allowed, they do not extend to any other cases than those of frauds by ordinance. For both Emerigon and Roccus assert that the general rule is, to deem all transactions *bona fide*, till the contrary be proved. 2 Emer. 132. Roc. Not. 51, 78. But the conduct of the defendant, in permitting the seamen who arrived on the 17th to depart without examination, ought to preclude him from casting an air of suspicion on the transaction. He had it in his power to have procured their testimony, and has neglected to do it. The question of fraud has been fairly submitted to that tribunal which, by our jurisprudence, is authorized to decide on it, to the jury, and they have pronounced in favor of the plaintiff. The day of the sailing of the *Eliza* is, by the broker's testimony, said to have been communi-

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ated, as stated in Riley's memorandum. If this was "done on the 16th, and the premium then was [*68] only six per cent., the lapse of two days could not have much enhanced the amount. There is, therefore, no reason for granting a new trial, especially as, from the register not being now in our power, we may be non-suited for want of proving interest.

Harrison and Pendleton, in reply, enforced the original positions of *Pendleton*.

LIVINGSTON, J., delivered the opinion of the court. The motion to set aside the verdict, in this case, is made on the grounds of fraud and concealment.(a) The fraud alleged is, that Riley, who caused the insurance to be effected, knew at the time that the vessel was lost.

Fraud, like other matters, may be established by circumstances. But the jury were not necessarily bound to conclude that Riley knew of the loss, because two of the *Eliza's* crew had arrived in this harbor, in the night preceding the day on which the insurance was made, especially without proof of their coming on shore; nor because intelligence of it had been received at one of the printing offices in this city, as early as eight in the morning of that day. This might be, and yet Riley know nothing of it. These and other circumstances have been submitted to the jury, and we cannot say their verdict on this point is contrary to evidence, or that we are at all dissatisfied with it.

The charge of an undue concealment appears to be better supported. The vessel sailed on the 25th of September, 1801, and when Riley ordered insurance to be made, he admits that he knew of her sailing as early as the 3rd of October in that year. This fact, which was a very material one in computing the risk, there is too much reason

(a) See *Key v. Hall*, 1 Chanc. Rep. 68, (a) and the case in the text after the new trial there awarded. 1 Johns. Rep. 321.

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to believe, was not communicated to the defendant previous to his subscribing the policy on the 18th of November, 45 days after the ship had left Jamaica. The same risk was underwritten only two days before, and the same policy was used, when it was not suspected or known that the Eliza was out of time, at the same premium at which Delafield wrote on the 18th, when it was known by the assured, or his agent Riley, that she was a missing vessel. It cannot be believed that any underwriter, however hardy, would not ask more than an ordinary premium for insuring a vessel which had been out 45 days between Jamaica and this port. Seton, the insurance broker, certainly does not prove that he made this communication to the underwriters. The order which he speaks of was delivered [*54] to those who underwrote on the 16th, and therefore could not have contained the information which Riley did not acquire until two days after. It is remarkable that in the memorandum made by Riley, of his transactions on the 18th, he does not say that he informed Seton when the Eliza sailed. The contrary may fairly be inferred, from the advice Seton gave him, to have insurance made immediately "as the risk would increase in a few days very considerably." This observation would hardly have escaped the broker, unless he had then expected to get insurance at the ordinary premium, which he could not have supposed, if he had been informed how long the vessel had been out. A fact of so much importance ought to have been more satisfactorily proved. There is no pretence for saying the order for insurance is in the defendant's hands, unless, as is stated, it be the one which was given on the 16th. If that be the case, which is highly probable, it would furnish conclusive testimony against the plaintiff on this point; it would establish that Seton, in obtaining an insurance on the 18th, repeated, or gave the same information to the underwriter as was given on the 16th, and was silent as to the time of sailing, which a man so intelligent and correct would not have been, if that fact had

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then come to his knowledge. Knowing also the importance of his employer's being able to prove so essential a communication, he would have been careful to preserve evidence of it. But if a written communication was given on the 18th different from that of the 16th, and it is in the defendant's possession, the plaintiff should have put himself in a condition to prove the contents, by giving notice to produce it.

Upon the whole, we think this fact ought to undergo a further investigation, and therefore order that a new trial be had, upon payment of costs by the defendant, and further that he admit on the next trial the plaintiff's interest, and preliminary proofs,[1]

New trial.

BUNN and DICKINSON, Assignees of VALENTINE, a
Bankrupt, against MORRIS and WISNER.

If several persons unite in an adventure, the profit and loss of which is to be shared, and the loss borne according to their respective proportions, and the whole be received by a third person under an express promise to pay the share of each, according to the several interests, he cannot set up any equities which one may have against the other, or object that they were partners, but must pay according to his promise.

ASSUMPSIT for money had and received, the first count laying it to the use of the bankrupt before his bankruptcy; the second to that of his assignees. From the evidence

[1] Every fact in the knowledge of the assured, which enhances the ordinary risk, and which would, if disclosed, enhance the premium, ought to be communicated to the underwriters. *Seton v. Low*, 1 J. C. 1; *Livingston v. Delafield*, 1 J. R. 522; *Williams v. Delafield*, 2 Cal. R. 329; *Mackay v. Rhineland*, 1 J. C. 408. What facts within the knowledge of the assured are material to the risk, and necessary to be communicated to the assurers at the time of the application, is matter exclusively for the jury to determine. *New York Fire Insurance Co. v. Weiden*, 12 J. R. 16; S. C., 12 J. R. 513.

On application for insurance, it is stated by the insured that no spirits would be allowed on board; in an action on the policy, it is proved that the master of the vessel had two kegs of spirits in the cabin, which would have

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disclosed at the trial, the following appeared to be the circumstances of the case:

[*55] *Valentine, the bankrupt, being owner of one third of the sloop Nancy, agreed with the firm of

become his as a perquisite on his arrival at the port of destination, but which were not even broached while on board; held, that the policy was valid. Such a representation would not forbid the taking on board a whole cargo of spirits, if taken for transportation in the regular course of business. *Irvine v. Sea Ins. Co.*, 22 Wen. 380.

Where the policy states the insurance to be for account of A. B., it is equivalent to a representation that A. B. is owner. *Kemble v. Rhinelanders*, 8 J. C. 130.

Fraud may be established by circumstances. *Livingston v. Delafield*, 3 Cal. R. 49.

A jury is not bound to conclude that the insured knew of a loss at the time of effecting the insurance, because two of the vessel's crew had arrived in the harbor the night before, and intelligence of the loss had been received in the place where he resided on the day when the policy was subscribed. *Id.*

Every fact in the knowledge of the assured, which enhances the ordinary risk, and which would, if disclosed, enhance the premium, ought to be communicated to the underwriters. *Seton v. Low*, 1 J. C. 1.

In effecting the insurance, the broker stated to the insurer that the vessel was expected to sail the latter end of September, or the beginning of October. On the morning of the day on which the insurance was effected, a vessel arrived, bringing information that the vessel insured had sailed about the 3d of October, which news was not communicated to the insurers. The court refused to grant a new trial, on the ground of its being a concealment of a material fact, after the verdict of a second jury in favor of the plaintiff. *Livingston v. Delafield*, 1 J. R. 522.

If a person, who is a subject of and residing in, a belligerent country, be beneficially interested, a *cestui que trust* in property warranted neutral, his interest should be disclosed to the insurer. *Murray v. United Ins. Co.*, 2 J. C. 168.

The insured made the following representation: "I have information of her sailing, and she has been out this day, 26 days;" the information is applicable as well to the sailing as to the time she had been out; and although it appears that she had been 27 days out, the difference is immaterial. *Williams v. Delafield*, 2 Cal. R. 329.

A representation that a man has been a naturalized citizen since a particular year, does not mean that he was so in that year. *Coulton v. Bowne*, 1 Cal. R. 288.

A representation, in time of peace, that the vessel will sail in ballast, is substantially complied with, though she sail with a trunk of merchandize

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Jackson & Perkins, who were traders owning another third, to load the vessel for the West Indies; he to furnish one half of her cargo, and they the other; either party to make up any deficiency that might arise on his or their side; the

and a few barrels of gun-powder laden on board. *Suckley v. Delafield*, 2 Cal. R. 222.

The insured is not bound to disclose to the insurer that the goods insured are contraband of war, as such goods are lawful within the meaning of the policy. *Seton v. Low*, 1 J. C. 1; *Skidmore v. Desdouty*, 2 J. C. 77; *Juhel v. Rhineland*, id. 120; S. C., affirmed in error, Ib. 487.

A representation that the vessel insured is American, is equivalent to a warranty. *Vandenhussel v. Church*, 2 J. C. 173.

A representation that the vessel has a bill of sale on board is not complied with, unless it be produced, or capable of being produced when occasion requires; and it is a material document, and necessary to be on board. *Murray v. Alcop*, 3 J. C. 47.

A representation to the insurer, that a vessel had been out about nine weeks, when, in fact, she had been out ten weeks and four days, is not a material misrepresentation, provided the latter period be within the usual time of the voyage; and what is within the usual time for a vessel to perform a voyage is a question of fact for the jury. *Mackay v. Rhineland*, 1 J. C. 408; *Williams v. Delafield*, 2 Cal. R. 329.

The insurer is presumed to be acquainted with the situation and topography of the places to which the vessel is destined. *De Longuemere v. New York Fire Ins. Co.*, 10 J. R. 120.

So, if there be no havens or harbors on the coast to which the vessel is insured, that fact will be presumed to be within the knowledge of the insurer, and need not be disclosed. *Id.*

The master of a vessel insured to Martinique, without specifying the port, was instructed by his owner to keep well to the eastward, and to endeavor to make a particular port in M., and if he should be turned away by a cruiser, then to go to L., and take the first opportunity to get to M. These instructions were not made known to the insurer; but the court held the concealment immaterial. *Talcot v. Marine Ins. Co.*, 2 J. R. 130.

If the policy contains no warranty, concealment of the residence of the insured in a belligerent country, or of the interest of such person in the property is immaterial. *Elting v. Scott*, 2 J. R. 157.

It is necessary to disclose how long a vessel had been in the port from which she is insured, unless her having been there previous to the insurance had enhanced the risk. *Kemble v. Bowne*, 1 Cal. R. 75.

It is not necessary to disclose that the vessel is a prize ship, except in the case of a warranty or representation, negating her being a ship of that description. *Id.*

That the insured is a subject of a belligerent state, and had emigrated to

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whole, however, to be sold in the West Indies, and the proceeds invested in a return cargo. But, except in this transaction, Valentine was totally unconnected in business with the partnership of Jackson & Perkins, who constituted

this country, *flagrante bello*, and becoming naturalized, need not to be disclosed. *Duguet v. Rhinelander*, in error, 2 J. C. 476; S. C., 1 C. C. E. 25.

Where an assignment of the policy does not vary the risk, the insurer need not have notice. *Earl v. Shaw*, 1 J. C. 313.

Where there is no warranty or representation, the sailing with a false clearance is immaterial, and need not be disclosed. *Barnwell v. Church*, 1 Cal. R. 217.

A vessel, of which the master was part owner, was cast away and lost about ninety miles from the port of destination, where the other part owners resided, who, after the loss, and before notice of it, had insurance made; there being no actual fraud in the case, it depended on the question of constructive fraud, on the ground that the captain had not used due diligence in communicating intelligence of the loss; held, that the master, not having directed insurance, or being apprized of any intention to insure, was bound to exercise ordinary diligence only. *Andrews v. Marine Ins. Co.*, 9 J. R. 32.

A vessel was insured from A. to B.; before effecting the insurance, another vessel had arrived at B. from A., which place she left subsequently to the sailing of the vessel insured; it is not, thence, to be intended that the insured knew of a storm, which the vessel that arrived had encountered, and concealed the fact; and his communicating to the insurer that he had information of her sailing, is a sufficient intimation that a vessel which sailed with or after the one insured had arrived. *Williams v. Delafield*, 2 Cal. R. 329.

If an insured send orders, by several conveyances, to insure, and afterward arrive in the neighborhood of the place to which his letters were directed, knowing that a loss had in the meantime happened, and on board a vessel in which he knew one of his letters to be, he is bound to give his agent information of the loss by the same mail which he knew would carry the letter ordering insurance; and an insurance, effected under such circumstances, will be void. *Watson v. Delafield*, 2 Cal. R. 324; S. C., 1 J. R. 150; S. C., affirmed in error, 2 J. R. 526.

When the policy is effected for "whom it may concern," the insurer has no right to say that the name of insured was not disclosed; in such case, the insurer takes upon himself the risks of the property, whether delinquent or neutral. *Elting v. Scott*, 2 J. R. 157.

A representation is defined to be a collateral statement, either by parol, or in writing, of such facts or circumstances relative to the proposed adventure, and not inserted in the policy, as are necessary for the information of the assessor, to enable him to form a just estimate of the risk. If the fact or circumstance appear on the face of the policy, it becomes a warranty, and not a representation; it is essential, therefore, that it be of some matter out of, and

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a house distinct from him; and even in the present association, though they were to share in profit and loss, yet it was to be only in proportion to the lading they respectively put on board. The vessel having sailed on her voyage, Jack-

collateral to, the contract, and makes no part of the policy. *Vandervoort v. Smith*, 2 Cal. R. 155.

A *bona fide* equitable interest in property, of which the legal title is in another, may be insured under the general name of property, or by a description of the thing insured, unless there be a false affirmation or representation, or a concealment after inquiry of the true state of the property; and the applicant for insurance is not bound to state the particular interest he has in the premises to be insured, unless specially inquired of by the assurer. *Tyler v. Etaa Ins. Co.*, 8 Wen. 507.

A new trial will be granted where the judge, instead of submitting the question to the jury, whether the concealment of the fact of a previous insurance was or was not material to the risk of a subsequent insurance, charged them that knowledge, by the assured, of a previous insurance, and neglect to disclose the fact, was such a concealment of a fact, material to the risk as avoided the second policy. *Id.*

The necessity of disclosing the title of the applicant would greatly embarrass the operation of insurance, without affording any essential benefit to the offices. *Id.*

Any error in the deduction or description of a title might be fatal. *Id.*

The insurer is only responsible to the extent of the interest of the applicant, and that must be shown upon the trial. The only object, therefore, in the previous disclosure of it, is, to enable the insurers to estimate the risk and premium. *Id.*

What facts within the knowledge of the assured are material to the risk, and necessary to be communicated to the assurers, at the time of the application, is matter exclusively for the jury to determine, as was decided after the fullest consideration, and by the highest tribunal in the state. *New York Fire Ins. Co. v. Welden*, 12 J. R. 16; 8 Q. 12 J. R. 513.

The underwriter on a policy of insurance enters into the contract, and computes the premium, in full confidence that the insured, being fully informed of all the circumstances relating to the intended voyage, has dealt fairly with him, and has kept back nothing which it might be material for him to know. Every fact and circumstance, therefore, which can possibly influence the mind of the insurer, in determining whether he will underwrite the policy, or at what premium, is material to be disclosed, and a concealment thereof will vitiate the policy. *Ely v. Hallett*, 2 Cal. R. 57.

A concealment is to be considered, not with reference to the event, but to its effect at the time of making the contract. The question, therefore, must always be, whether under all the circumstances, there was at the time the policy was underwritten, a fair representation, or a concealment, either de-

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son & Perkins, previous to her return, in consideration of 5,000 dollars, expressed to have been paid, but when in fact not one had ever passed; assigned the whole of her return cargo to Abraham Varick and the defendant Wisner, "to be applied to take up all notes drawn by Jackson & Perkins in favor of, and indorsed by Bennet & Brower, so far as they might legally be so applied and no further." At the time of this assignment, which was totally unknown to Valentine, the assignees, Varick & Wisner, were perfectly acquainted with the interest of Valentine, to whom no communication of the transaction was made, and on

signed or fraudulent; or, though not designed, varying materially the object of the policy, and changing the risk understood to be run. *Id.*

It is always a question how far the want of disclosure of a paper, admitting it to be intentionally a false one, was material to the risk. *Le Roy v. United Ins. Co.*, 7 J. R. 343; *Barnwell v. Church*, 1 Cal. R. 217; *Kemble v. Bowne*, 1 Cal. R. 75; *Talcott v. Marine Ins. Co.*, 2 J. R. 130; *Walden v. New York Ins. Co.*, 12 J. R. 128.

In an action on an open policy on goods laden on board the brig *Minerva*, at and from New York to Amsterdam; and in the memorandum at the bottom, the property insured was warranted to be American property; and also warranted that the property was not imported by the exporters. The vessel was taken by a British privateer, and the hides, which were insured, were condemned, as belonging to the enemies of Great Britain. The defendants objected to a recovery as for a total loss, on the ground, that the vessel had on board a certificate of origin from the French consul, and that the defendants were not informed of this document. It was said to have been a false paper, and the efficient cause of condemnation; but the court held, that the plaintiffs were entitled to recover, saying, "admitting the certificate not to be strictly true, there was no evidence of any *mala fides* in the plaintiffs, the jury have not found any fraud in them, in respect to the contents or concealment of the paper. On the contrary, it is found by the jury that such a certificate was a usual and customary document on board of a vessel for France or Holland; and it was held that the insured were not bound to make it known to the insurer. *Le Roy v. United Insurance Company*, 7 J. R. 343.

If he accept the abandonment, the subsequent wages will be chargeable to him as owner, and not as insurer. *Id.*

It seems that the particular interest which the insured has in the property insured, need not be described in the policy. Thus, a mortgagor or mortgagee need not disclose his qualified or partial interest. *Trader's Ins. Co. v. Roberts*, 9 Wen. 400.

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the arrival of the sloop, before which period Valentine had stopped payment, some difficulty about the division of her cargo being apprehended, the whole was put, with the consent of all parties, into the hands of the defendants to sell on commission, upon an express undertaking by them to pay separately to each house its respective proportion of the net proceeds. Subsequent to this, the house of Jackson & Perkins became insolvent, and Jackson being examined, swore that Valentine had, after placing the property with Morris & Wisner, agreed that his share should, in the first place, be disposed of in satisfaction of such balance as might be due from him to Jackson & Perkins on account of the shipment and taking up of certain bills then unpaid, but indorsed by them for Valentine, in consequence of which they had taken up notes to the amount of 1,884 dollars and 94 cents. Every word of this was flatly denied by Valentine, who deposed that he always declared to Jackson & Perkins, that the whole of his interest, in the cargo of the Nancy, should go to his general creditors, and that he forbade paying any of his notes, as both he and Perkins & Jackson were insolvent.

On this testimony, the counsel for the defendants insisted the *plaintiffs ought to be non-suited. 1st. [*56] Because Jackson & Perkins were so interested with Valentine in the cargo of the Nancy as partners, or otherwise, as to be enabled to make a legal transfer of the whole cargo; 2d. That the assignees, standing in the place of Smith Valentine, could recover no more from the defendants than Valentine could have done from Jackson & Perkins, and as to them a balance was due, there consequently could not be a recovery.

The judge having overruled the last position, reserved the first for the opinion of the court, and then, leaving the credibility of the witnesses to the jurors, charged for the plaintiffs, in favor of whom the jury found.

Application was now made to set aside this verdict, and grant a new trial for a variety of reasons. The decision

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of the court, however, was confined to the second only, which was, that allowing Valentine and the house of Jackson & Perkins to be tenants in common of the cargo, and therefore, as between them, no action would lie, yet the promise of the defendants to account separately to each, rendered them liable, independent of the nature of the tenancy.

Hopkins, for the plaintiffs. It is immaterial how many persons were interested in the property in question, or of what nature their interest were; the express promise of the defendants was to pay according to the several rights, and, therefore, became a separate engagement to each for his proportion.

Riker and Wilkins, contra. The benefit of this promise is claimed by assignees, and, therefore, subject to all the equities which could be urged against their bankrupt. The defendants are entitled under Jackson & Perkins; whatever, therefore, they might claim against Valentine, Morris & Wisner may against his assignees.

Hopkins was told it was unnecessary to reply.

Per Curiam. It was left to the jury to decide on the accuracy and credibility of these witnesses, and it seems that they believed Valentine. The only question, therefore, is, whether the assignment made by Jackson & Perkins, can, under the circumstances of this case, defeat the plaintiffs' recovery.

From the manner in which the case is presented to the court, it is to be intended, that the defendants have sold the cargo, are possessed of the money, and that no difficulty exists of ascertaining the respective interests of the parties. It will not be necessary to decide, whether Jackson & Perkins and Valentine were partners with respect to the cargo. If they were not, there could not exist

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*a shadow of doubt; and if they were partners, [*57] the objection does not lie in the defendants' mouths.

They have no concern with the partnership; their undertaking was to pay each house, separately, the net proceeds of the property. As respects the defendants, it was a several and distinct undertaking. The case is too clear for argument. The opinion of the court is, that the plaintiffs are entitled to judgment on the verdict.[1]

New trial refused.

 SMITH against CHEETHAM.

If to ascertain the *quantum* of damages a jury agree that each shall set down such sum as he thinks fit, divide the aggregate by 12, and the quotient be the verdict, it is an irregularity for which it will be set aside. The confessions of jurymen as to their own misbehavior may be heard in applying to set aside a verdict, and so, *ut semel*, may their affidavits. If judgment has been entered before argument brought on for want of an order to stay proceedings, and the judge refused to grant one merely because he thought the case would be determined within the first four days of term, it will be no objection to awarding the new trial ordered.

THIS was an action for a libel, in which a verdict for 200 dollars had been rendered in favor of the plaintiff.

Miller, on behalf of the defendant, moved to set it aside for irregularity in the jury, upon an affidavit of the constable who attended them, stating, that after they had retired to their room to agree on their verdict, and while discussing the matter, he heard one of them say one cent damages

[1] Where there are several jointly interested in a contract, they must all join as plaintiffs, whether suing in their own right or in the right of another, as assignees, trustees, or the like. *Brinkerhoff v. Wemple*, 1 Wen. 470. As to the claim being joint, the necessity of joinder, and the consequences of non-joinder, see authorities fully collected by A. Burr, *arguendo* for defendant in *Smith v. Bradstreet*, 5 Cow. 213; also vide Code, sec. 97, 100.

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was enough; another, that six cents damages and six cents costs were sufficient; and that he afterwards saw at least six of the jurors take a pen and mark down what he believed, and understood to be, the sum that they thought proper to give as damages in the cause, and from what he then saw and heard, he understood the whole sum should be divided by 12, and the quotient was to be the verdict. That two of the jurors had since owned to him that the verdict was determined by an agreement that each should put down such sum as he thought proper, that the whole should be divided by 12, and that the verdict was really thus determined.

These facts, he contended, were sufficient to warrant the application. That they did not rest solely on the confession of a juror, which might possibly be deemed inadequate, but came through a channel perfectly regular. In *Hale v. Cove*, 1 Stra. 642, a verdict rendered by drawing of lots was set aside, though according to law. The principle of that case applied to this. It was a determination without regard to the merits. One inveterate juror might, by putting down a large sum, insure an excessive and ruinous verdict.

Emott, contra. The case cited, and all others on the same point, went on this principle, that it should not be left to chance to determine *on which side* a verdict should be given. Here, there was no dispute about the party in whose favor it ought to have been rendered. The [*58] sum only was to be ascertained. Had each juror mentioned the amount of damages he thought right, to come to an agreement, there must have been concessions. The mode complained of was as pure and innocent as if effected by word of mouth or conversation.

SPENCER, J. In this cause the inclination of my mind was against setting aside the verdict, considering it indisputable that the *affidavits* of jurors, and of course their confessions, could not be received. Were that the law, then the affi

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davit of Murphy would not establish the fact that the verdict was the result of chance. But, on examining the English authorities prior to the revolution, it appears to me that the information of jurors, as to what passed, may be received. The only decision to the contrary is in *Prior v. Powers*, 1 Keb. 811, but it is a very unintelligible and illy reported case. The determination in *Melish v. Arnold*, Bunbury, 51, and *Phillips v. Fowler*, Barnes, 441, show that the information of jurors may be received, and I cannot perceive any principle of law invaded by it. The affidavit of Murphy, in connection with confessions of the jurors, leave no doubt, that the amount of damages was ascertained by each person's setting down the sum he thought fit, and dividing the aggregate by twelve. If this practice be tolerated, it will prevent that discussion and examination so necessary to the development of truth, and so essential to justice. To affirm the present verdict would be to sanction a practice dangerous in the highest degree. I, therefore, am of opinion that a new trial be had, and that the costs abide the event.

LIVINGSTON J. Every verdict should be the result of reflection, and not the effect of chance or lot. Jurors being sworn to determine according "to evidence," suitors have a right to expect that they will examine and decide upon it to the best of their ability and discernment. But if lot is to be substituted for judgment, if deliberation and reflection are to yield to the cast of a die, parties, instead of exposing themselves to a heavy and useless expense, will gamble away their rights, or have recourse to more intemperate means of ascertaining them. The practice, therefore, cannot be to promptly nor strongly discountenanced. Accordingly in England, where so much pains are taken to preserve a pure administration of justice, not only verdicts determined by lot or hazard are always set aside, but every species of misbehavior in a jury is narrowly watched, and, if not punished, the party affected by it is never de-

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nied relief. Thus new trials have been granted, [*59] because jurors have been *allowed to go at large by the officers having the custody of them; because they had taken refreshments between the charge and delivering their verdict; because one of them left his fellows, and then returned with a paper which influenced their decision; because a juror had received a paper from the plaintiff after leaving the bar, and especially on the ground, which most nearly resembles that on which this application is made, I mean that of determining by lot. Bro. Abr. tit. Verd. 17, 18, 8d edit. Ibid, 18, 14; Her. 7, 1; 1 Sid. 235. Thus, in *Melish v. Arnold*, Bunb. 51, a verdict was set aside, because whether three or five hundred pounds should be given, was determined by throwing up cross and pile. In *Hale v. Cove*, 1 Stra. 642, because two papers were put into a hat, on the one marked P. coming out, a verdict was found for the plaintiff, which, although according to evidence and the judge's opinion, was set aside. The same thing was done in *Phillips v. Fowler*, Barnes, 441, because recourse was had to casting of lots; and in *Vaise v. Delaval*, 1 D. & E. 11. Id. Mansfield assented to the propriety of the rule, but would not receive an affidavit of the fact from the jurymen themselves, although in *Phillips v. Fowler*, such a one was read. With proper submission to his lordship, it appears the best and highest evidence of which the case admits. If a man will voluntarily charge himself with a misdemeanor, why should he not be indulged? Are not criminals in England every day convicted, and even executed, on their own confession? And is not our state-prison filled in the same way? But, perhaps, it may be thought that this verdict cannot be classed with those which have been the result of chance. If not, the method pursued was still more exceptionable. Where chance alone is tried, the decision will sometimes be correct, however wrong the means of arriving at it. Indeed, not many centuries back, our superstitious ancestors considered this equivocal mode of ending a controversy as a direct and legitimate appeal to heaven, and

as a certain way of discovering the divine will. Here, the method of deciding as effectually precluded a proper exercise of judgment, as that of chance; and, what is worse, put it in the power of any one juror, from prejudice, passion, or other bad motive, to ruin a defendant. He is only to set down a sum sufficiently large, and, if his fellows adhere to their promise, a most outrageous verdict will be the consequence. Thus no one can tell, at the time of pledging himself, what sum he will finally agree to. It was said on the argument, that this might be nothing more than an essay to produce an understanding. As a mere attempt at unanimity, there might be nothing *very [*60] reprehensible in it; but it is impossible to regard what passed in any other light than a stipulation, by each man, to set down any sum he pleased, and that the quotient arising from a division by twelve should, at all events, become his verdict. The die was not only to be cast, but the throw, whatever it might be, abided by. If evidence of this fact may not be received from a juror himself, (which opinion, however, I do not here adopt,) what stronger proofs than those we already have, can be required of the misbehavior complained of? The constable who kept the jury swears, "that from what he heard and saw, he understood that the sums set down by the several jurors were to be divided by 12, and the quotient was to be the verdict." He also swears, "that the verdict was determined by an agreement that each should put down such sum as he thought proper, and that the whole should be divided by 12, and the verdict was thus determined." Another witness informs us that some of the jury acknowledged the whole matter to him. Stronger than all this is the silence of the jurors themselves. Exculpatory affidavits would hardly be rejected, and yet not one is produced. We cannot suppose any juror would be so regardless of character, and so insensible to the calls of justice, as to deny the plaintiff so small a boon. In the case cited from Bunbury, affidavits had been made by persons who heard the jurors

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talk of the matter, and great stress is laid on "their not thinking fit to clear themselves by oath." So in *Parr v Seames and others*, Barnes, 438, where a verdict had been determined by "hustling halfpence in a hat," the court gave the plaintiff an opportunity to procure affidavits from some of the jurors. With me, this silence is conclusive evidence, not only of the truth of the affidavits so far as they go, but of every inference against their conduct, which the circumstances disclosed will in any degree warrant. If we ask for stronger proofs, and at the same time adopt Lord Mansfield's rule of shutting the mouths of the jurors, we may as well, at once, close the door on all inquiries of the kind, and leave them to act and decide as they please. The only case from which Lord Mansfield's opinion can derive any support whatever is that of *Prior v. Powers*, 1 Keb. 811. There one of the jury had confessed the whole matter, but being against himself, it was not much regarded, and the court seem afraid that if they granted a new trial they would have to punish the jury, which could not be done on their own confession. Why the judges are [*61] so very tender of the *jury; or why they, as well as others, may not be punished on their own confession, which is the highest evidence, we are not told. But, without refuting an argument which is founded altogether in mistake, it is sufficient to say that this decision took place in the 16th year of Charles II.; and that, since that time, information has, in various instances, been received from the jurors themselves, so that long before the revolution it ceased to be a precedent in England, and of course is not now binding here. The case of *Vaise v. Delaval*, happened since the revolution, and therefore forms no precedent. My opinion, on the whole, is, that there be a new trial with costs to abide the event, agreeably to the decision in *Hale v. Cove*. The losing party ought not to pay for being relieved against misconduct and irregularity in a jury, any more than against the consequence of a misdirection on a point of law.

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KENT, Ch. J. If the jury cast lots for whom they shall find, it would, no doubt, vitiate the verdict. 3 Black. 376. *Hale v. Cove*, 1 Stra. 642; Barnes, 433. *Prior v. Powers*, 1 Keb. 811. *Foy v. Harder*, 3 Keb. 805. But the better opinion is, that the fact must not be derived from the jurors themselves, since the court cannot take notice of it, with out, at the same time, making the jury answer for the misdemeanor. 1 Keb. *ubi sup.* *Vaise v. Delaval*, 1 D. & E. 11.(a) The decision, however, in *Phillips v. Fowler*, Barnes, 441, is *contra*. In this case, then, I incline to the opinion, that so much of the affidavit as relates to the confession of the two jurors ought not to be received, although I do not think that part of it, if proper, adds any material strength to the motion. The charge here, is not that the jury cast lots whether they should find for the plaintiff or defendant, but only that, in ascertaining the amount of the damages, they took the average sum deduced from the different opinions of each other. This has no analogy to the case of casting lots, or determining by chance, for whom they shall find. The liquidation of damages must always, in a certain degree, be the result of mutual concession, since the amount of the injury is not susceptible of being ascertained with mathematical precision. If this mode of collecting the medium of their different opinions, was fraudulently abused by any of the jury, by fixing on a sum intended to be extravagantly high or low, and which was not given in good faith, it would, perhaps, justify our interference; but no such fraud appears, or is to be presumed, in the present case. I do not, therefore, think that this mode of ascertaining the average sum was in itself exceptionable, and if, *when ascertained, it appeared to the jury to be a [*62] reasonable sum, under all the circumstances of the case, connected with sentiments of respect and conciliation for each other's opinions, I think it was not improper for

(a) See *Owen and another v. Warburton*, 1 New Rep. 326, that the court will not set aside a verdict, upon the affidavit of a jurymen that it was decided by lot.

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them finally to adopt that sum.[1] As we are to intend all this took place, for nothing appears to gainsay it, I think the motion ought to be denied. It may not be improper to add, in confirmation of this opinion, that it is supported by that of the court of common pleas of Philadelphia, in the case of *Cowperthwaite v. Jones*, 2 Dall. 55, and which was afterwards affirmed in the supreme court of that state.

THOMPSON, J., gave no opinion, not having heard the argument.

TOMPKINS, J., had been concerned.

New trial.

. After the decision of the court was pronounced, Wilkins observed, that, as no order to stay proceedings had been served, judgment had been perfected before the argument took place, and though this fact was unknown

[1] In *Mitchell v. Eble*, 10 Wendell's Rep. 595, which was an action of slander, the jury, after an ineffectual attempt to agree on a verdict, left it to lot, whether the verdict should be for the plaintiffs or defendants, by placing ballots in a hat, some marked *prize*, and others being blank, to be drawn out by the jurors; and if more *prizes* than blanks were thus drawn out of the hat, it was agreed the verdict should be for the plaintiffs, otherwise for the defendants. The supreme court set the verdict thus rendered aside.

As to particular instances of misconduct of jury, which will set aside a verdict, see *Douglass v. Tonsey*, 2 Wend. 352; *Wilson v. Abrahams*, 1 Hill, 207, overruling *Brant v. Fowler*, 7 Cow. 262; *Cole v. Perry*, 6 Cow. 584; *Oliver v. Springfield Presbyterian Church*, 5 Cow. 283; *People v. Douglass*, 4 Cow. 26; Hill, *ex parte*, 3 Cow. 855. (It is irregular for a jury each to put down a sum which they find for the party, add the sums together, divide by the number of jurors, and adopt the quotient as their verdict. *Roberts v. Fadlis*, 1 Cow. 238; *Smith v. Thompson*, 1 Cow. 221; *Hackley v. Hastie*, 3 J. R. 252; *Thayer v. Van Vleet*, 5 J. R. 111; *The People v. Meaney*, 4 J. R. 294.

Affidavits of jurors in exculpation of themselves, and in support of their verdict, are admissible, so also to show that a mistake has been made in taking their verdict, and that it was entered differently from what they intended. but the affidavits of jurors are not to be received to impeach a verdict. *Dana v. Tucker*, 4 J. R. 487; *Jackson ex dem. Noole v. Dickinson*, 15 J. R. 309.

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to the counsel concerned, still it was within the rule of *Shephard ads. Case, Cole, 90.*

LIVINGSTON, J. I imagined, when I was applied to for an order, that the argument would have been had, and the determination pronounced, within the first four days of term, so that judgment could not have been entered; otherwise, I should have granted the order to stay proceedings: the defendant must not be prejudiced by my omission, or misconception.

JACKSON, *ex dent.* SHERWOOD, *against* PHELPS.

By the act of 5th of April, 1803, the title to the military bounty lands vested in the patentees at the time of their deaths respectively, though they died previous to the 27th of March, 1786.

EJECTMENT for lands in Scipio, in the county of Onondaga.

Samuel Mitchel, the patentee from whom the lessor of the plaintiff derived title, was a soldier in the New York line, who died in October, 1781, without issue, leaving a brother named Martin, and a sister called Mary. By the fifth section (vol. 2, Greenleaf's ed. 333,) of the statute, (of the 6th April, 1790,) "to carry into effect the concurrent resolutions and acts of the legislature, for granting certain lands promised to be given as bounty lands, and for other purposes therein mentioned," it was enacted "that the letters patent, directed to be issued, shall issue in the names of the persons who have actually served in the line of the army of the United States, as designated in the concurrent resolutions, and the eleventh clause of the act passed on the *11th day of May, 1784, granting [*63] the same to such persons respectively, and to their respective heirs and assigns forever, and the lands to be

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granted in and by the said letters patent shall be deemed, considered, and adjudged to have vested in the respective grantees and their heirs and assigns respectively, on the 27th day of March, in the year of our Lord, 1783; and all grants, bargains, sales, devises, and other dispositions made by any of the said grantees, or their heirs or assigns, of the said lands so to be granted to them respectively, or any part thereof, between the said 27th day of March, in the year last aforesaid, and the date of such letters patent respectively, shall be as good and effectual, as if the said letters patent had been granted on the said 27th day of March in the year last aforesaid."

Some short time after the passing of this law, the letters patent for the premises in question were granted to Samuel Mitchel. On the 21st of October, 1797, Martin Mitchel, by deed duly acknowledged and recorded, conveyed to Thomas Pardy, and he in the same manner, on the 10th of November, 1797, conveyed to Sherwood.

By an act of the legislature, entitled "An act, granting relief to certain persons claiming titles to lands in the counties of Cayuga and Onondaga," it is in the first section ordained, "that the title to all lands heretofore granted by letters patent, to officers and soldiers serving in the line of this state, in the army of the United States, in the late war with Great Britain, and who died previous to the 27th day of March, 1783, shall be, and is declared to have been, vested in the said persons at the times of their deaths respectively.

At the trial of the cause, which rested on one single demise from the lessor, the antecedent facts, documents, and laws, were given in evidence and relied on by the plaintiff. He also proved the defendant to be in possession of the premises, and that at the time the deed from Pardy was executed, it was agreed between the lessor of the plaintiff and Samuel Phelps, the late husband of the defendant, that Sherwood should purchase the premises from Pardy, for the benefit of himself, the lessor, Samuel Phelps, and

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others, then in possession of the premises, commence an action to try the validity of the title derived from Samuel Mitchel, and that, on establishing it, Phelps, or his representatives, should receive from Sherwood a deed for the premises in question, at 4 dollars per acre. On this testimony, the defendant moved *for a non-suit, [*64] which being overruled, she then produced a deed, duly recorded and acknowledged, from William I. Vredenburg to her late husband, for the very premises, dated the 6th of December, 1794. The judge having charged in favor of the plaintiff, the jury found accordingly. A case was then made, subject to the opinion of the court on this point: whether any title passed by the letters patent to Samuel Mitchel, the soldier, he being dead at the time they were issued.

Woodworth, (Attorney-General,) for the plaintiff. The decision of this case will depend on the acts of 1790 and 1803. It is objected that, by the words of the first law, nothing could pass to the soldier, who was dead. But if it was meant that only those in existence on the 27th day of March should take, the statute would never have directed that the lands should be deemed to have vested, on that day, in the "*heirs*" of the patentees. This word is not used merely to denote the quality of the estate, but, has a further operation, to vest it in the descendants of those not then *in esse*.—Doubts, however, having been entertained on this subject, the act of the 5th of April, 1803, was passed, which, it is presumed, puts the question at rest.

Emott, contra. The expressions relied on are merely words of limitation. The legal effects of words in a statute are the same as in a deed, and the terms used in the law referred to were only to give a fee, not describe the persons who were to take. If a devise be to a man and his heirs, and the devisee die before the testator, the devise is gone, because there is no one to take at the death

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of the testator, for the heirs cannot come in. The same principle applies in this case. It is an absurdity to say the legislature intended lands to vest in a man who was antecedently dead. Besides, what rule of descent is to prevail? In 1782 the common law would govern. In 1786 we changed that system, and abolished the rights of primogeniture. In addition to these arguments, the case shows, that at the time when Pardy's deed was executed, there was an adverse holding under color of title, and therefore nothing passed by it.

Woodworth, in reply. The facts and agreement in the case do away all the argument as to adverse possession, and show the whole procedure was to settle the question now brought up, which has never been determined. The 8th section of the act of 1803 prescribes the rules of descent, and establishes those of 1786. We allow that a devise to a man and his heirs in a deed, will not [*85] *operate as a *designatio personarum*, but it may be otherwise in a statute. Because the one conforms to the law; the other makes it.—By the law of 1803 the title is "*declared*" to have vested in the persons entitled at the times of their deaths. If so, it must descend to their heirs.

LIVINGSTON, J., delivered the opinion of the court. In deciding this cause, it is unnecessary to inquire whether the legislature, by its resolution of the 27th March, 1788, intended to comprise within its bounty, as far as regarded the line of this state, persons not embraced by the act of congress of 16th September, 1776; or whether the commissioners of the land-office, in carrying its views into effect, have expounded them too liberally, by issuing letters patent to soldiers who were dead at the time of its adoption; or whether, if those who were the authorized agents of government have erred in judgment, as to the proper object of gratuity, *bona fide* purchasers can now be

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disturbed. Nor is it of any use to settle the operation of military grants under the act passed the 6th April, 1790. It cannot be dissembled, however, that were it proper, in this collateral way, to draw into question the validity of a public grant, and our examination were limited to the terms of the resolution, and the effect of the grants, as fixed by this law, very serious difficulties would occur. Whatever our feelings might be, or however strong the claims on public benevolence, of those whose fathers may have perished in fighting the battles of their country, we could hardly, without some violence, or indulging an improper sympathy, give to these proceedings an interpretation as latitudinarian as the commissioners have done. From a view of the different public acts relative to this matter, and a recurrence to the history of the times, we should, perhaps, be compelled to say, that a provision was designed for such officers and soldiers only as were living in March, 1783.

But whatever doubts may have existed on these points, and on which no opinion is now intended to be given, none can reasonably be entertained at this day, with respect to the validity of titles derived through grants to military men who may have died at any period whatever during the British war. The legislature has, greatly to its honor, declared, by an act passed the 5th April, 1808, that the title "to all lands theretofore granted by letters patent to officers and soldiers serving in the line of this state, in the army of the United States, in the late war with Great Britain, and who died previous to the 27th March, 1783, should be, and thereby was declared *to have been [*66] vested in the said persons at the time of their respective deaths." This law was passed with a full knowledge of every circumstance, the same having been brought to public view by the commissioners appointed to settle the titles to this property. For, so long since as the year 1800, these gentlemen, in a very able report to the governor, had exposed the mistakes, if such they were, which

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had been made in a great many instances, of granting lands to persons who had died during the war, and in the inoperative nature of all such patents. They went further; they not only cautioned government against rendering those grants valid, but recommended the institution of an inquiry, as preparatory to a resumption of the lands. Nor were motives of interest wanting to allure to a measure of this kind; for, by a schedule accompanying this report, it appeared that, as far as had then come to the knowledge of the commissioners, the state would have gained in this way near two hundred thousand acres of land in a very valuable part of the country. The legislature, however, not forgetful of the services which the patentees had rendered in establishing the independence of their country, disdained, in a moment of tranquility, and when no danger impended, to listen to suggestions of interest, but with generosity not very common, and therefore the more laudable in a public body, confirmed all these patents without discrimination, and that by expressions so apt and strong, that neither on the argument nor since, has the plaintiff's title appeared to me liable to the smallest doubt. The acts being declaratory or not can be of no moment, as it respects these parties, although from its subject matter, as well as expressions, it would seem more naturally to belong to the former class. As these lands belonged to the state, if the patents were void or inoperative, (for it is not pretended they have been granted before or since,) it was competent to the legislature to confirm and quiet the titles derived under them, however defective they were before. And as we do not perceive, from the facts before us, that the rights of any person, otherwise acquired, will be affected by the confirmation, we are not bound to suppose that such cases exist. It does not appear that Vredenburg, who conveyed to Phelps, had any title at all. If he had, it is not pretended that he, or those under whom he claimed, derived any right from the state.

Something was said of an adverse possession in Phelps

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at the time of the execution of Pardy's deed ; but how could this be, when *Phelps had agreed that [*67] the purchase should be made for the express purpose of trying the validity of this title? Surely, stronger evidence cannot be required that Phelps did not hold adversely to Pardy, notwithstanding his deed from Vredenburg, than his willingness to take under the former, at a stipulated price, so soon as his title should be established. Would it not be monstrous to let him now set up his own possession, in defiance of the plain understanding of both parties, to defeat the recovery of Sherwood?

Nor is it important whether the act of April, 1803, passed prior, or subsequent to bringing this suit. Rather than put the plaintiff, who has now a perfect title, to a new action, because it be doubtful whether such were the case when this suit was commenced, and for no other purpose than to prevent the defendant's liability to costs, I prefer considering the law as relating back to the time of issuing the patent, which comports also with the intention of the legislature. The *postea* must be delivered to the plaintiff.

KENT, Ch. J. Upon this case the two following questions have been made. 1st. Whether there was an adverse possession of the premises at the time of giving the deed from Mitchel to Pardy, so as to render the same void ; 2d. Whether the original grant from the state to Mitchel, was a sufficient basis to support the plaintiff's title.

1. It appears that a deed of the premises was executed by William I. Vredenburg to Samuel Phelps, on the 6th of December, 1794, and although it is not stated when Phelps took possession under that deed, yet we find him in possession on the 10th of November, 1797, only a few days subsequent to the deed to Pardy. From this it might be presumed that he was in possession as early, at least, as the time of the sale to Pardy, and if so, his possession was under color of title, adverse to that of Mitchel. But, notwithstanding this might have been the case, I think that

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Phelps concluded himself from making that objection. When the lessor of the plaintiff purchased from Pardy, it was with the knowledge and assent of Phelps, and he was eventually to be benefited by it on the terms stated in his agreement. It was agreed between them, that the lessor of the plaintiff should purchase, and bring a suit thereupon to try the validity of the title derived through Pardy. This was a waiver of the objection now set up; for the object of the agreement was to try the validity of [*68] *the title, as it had existed in Mitchel. The parties never had in view this mere technical objection, which does not go to the merits of the title. It would be against good faith for the tenant, or one under him, now to set it up, and it therefore ought not to be permitted.

2. It is stated that the action was commenced in the year 1798, and I am of opinion that, at that time, the letters patent to Mitchel were nugatory and void, and the property remained vested in the people of this state. The act of 6th of April, 1790, gave letters patent for the military bounty lands an operation from the 27th of March, 1783, so as to be deemed to have vested title in the grantees from that time; and the legislature were no doubt competent to give their letters patent a relation back, to a time anterior to the issuing them. Considering the promise that the state had made to their two regiments of infantry, by the resolution of the 27th of March, 1783, this relation back to that time was no more than a just execution of that original promise, and not being to the prejudice of third persons, it was conformable to general principles of law. 18 Vin. Abr. tit. Relation, D. E. But this act of 1790, could not, by any just construction, be considered as authorizing grants, when the person to be designated as the grantee was not alive in March, 1783. The resolution of the legislature evidently referred only to officers and soldiers then *in esse*, and composing the regiments commanded by Van Schaick, and Van Cortlandt; and the resolution of congress of the 16th September, 1776, on which the resolution of the legislature

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was framed, only applied to the soldiers who should continue to the end of the war, and to the representatives of those who should be slain by the enemy. There could be no pretence that a soldier who died before 1783 was within those provisos, and the act of 1790, by making the letters patent to be issued in pursuance of the resolution, to refer back to the date of the resolution and no further, most undoubtedly meant, that they should correspond, and be commensurate only with the former provision. There is nothing in the word of the act, when attentively considered, that favors a different construction; and it would indeed have required the most explicit and positive provision to have extended the grants, by relation, anterior to the period of 1783, and beyond the limits of the original contract. The act of the 5th April, 1803, appears to reach and help these patents, made to persons who were dead in 1783, by reviving *the grant and giving it a relation back to [69] the life of the grantee. It declares "that the title to all lands before granted by letters patent to officers and soldiers serving in the line of this state, in the army of the United States, in the war with Great Britain, and who died previous to the 27th of March, 1783, shall be, and is declared to have been, vested in the said persons at the time of their deaths respectively." This act does not appear to have been intended as a declaratory act, and we ought not to presume it to have been so intended, when we do not perceive any solidity in the opinion that such was the antecedent law. And if this last act was a declaratory one, it would not be binding on the courts as such, although, as a legislative opinion, it would deserve and receive very respectful consideration. I consider, therefore, this act of 1783, as introductory of a new rule in respect to the letters patent in question; and had it passed before the commencement of the present suit, it would have conclusively established the plaintiff's title. The last provision affects no other rights than those of the state. There cannot arise any conflicting title in consequence of it, and it rested with the legislature in its dis-

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cretion to part with its title to the premises, in the mode, and to the extent, it should deem advisable. But a title acquired after the commencement of the suit, cannot be introduced upon the trial, unless it be one derived from the defendant, since this would be to charge the defendant with the costs of the suit. For this reason I think the plaintiff ought to have been non-suited at the trial, notwithstanding he appears to be now vested with a valid title.[1]

Judgment for the plaintiff.

 SHEFFIELD *against* WATSON.

A government agent, though known to be such, contracting for things for the use of government, will be personally liable on his contract, unless he make it, in his official character, on account of government, and the party contracted with appear to have looked to the government alone for compensation.[2]

ASSUMPSIT for work, labor, and materials in making two drafts and models for the frigate Adams, at the defendant's request. There being no dispute about the facts, a verdict was taken by consent, subject to the opinion of the court, on the following case.

The defendant, who was publicly known as the navy agent for the general government, in consequence of orders to have the Adams built, wrote to the plaintiff a letter, on the subject of the present suit, couched in these words:

[*70]

*July 8th, 1799.

"SIR,—

"I pray you to make a draft of the ship as soon as possible, for which you shall have the usual allowance from

Your humble servant,

"To Mr. Sheffield."

JAMES WATSON.

[1] See *Fisher v. Fields*, 10 J. R. 495.

[2] A public agent, in his known official capacity, employing a man to work on account of government, is not personally liable for his wages. *Walker v. Swartwout*, 12 J. R. 444.

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The plaintiff, in pursuance of this, made a draft and model on a scale of 108 feet; but directions having been given to the defendant to construct the frigate on larger dimensions, he ordered another draft and model, which were accordingly furnished by the plaintiff, who shortly after, in conjunction with one John Jackson, entered into a written contract with the defendant for building the ship. In this agreement Watson styled himself "agent for, and in behalf of the United States."

In ship-building, modelling and drafting are distinct charges, and, on the present occasion, constituted no part of the demand against government, they employing a regular draftsman of their own, whose business it is to furnish drafts and models for government ships, though, from some particular circumstances, he had not done it for the Adams.

Upon these facts it was submitted to the court to determine whether the plaintiff was entitled to recover for one or two drafts and models, or whether he was entitled to recover at all. If for the two, the verdict to be entered for 300 dollars; if for one only, for 150 dollars; but if not at all, then to be entered for the defendant.

Blake, for the plaintiff. This case will turn on the intent of the parties. Whether Sheffield considered the defendant as acting in his individual capacity, or as agent for the United States. The intendment of law would naturally view him in the first of these lights, for whoever contracts for the labor of another, assumes *prima facie* responsibility of payment. This alone would be sufficient to induce in the plaintiff a belief that he was to look to the defendant for his money. He would perform the services required under that impression, and with that intent. This, therefore, is to be the rule of construction to ascertain who, by the plaintiff, was contemplated as his paymaster. To show this intent of the parties ought to govern, 1 Pow. on Cont. 248. The fact relied on to destroy this general responsibility, and establish *the contract to have [*71]

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been entered into with another intent, is that the defendant was known to be the agent of the United States. Against this the letter of the plaintiff speaks a plain language; and for the very services the plaintiff rendered, government have an officer of their own, and could not, therefore, be resorted to by us.

Hopkins and *Harison*, contra. The question is, whether a known agent of the United States, acting in a line palpably for the service of the public, shall be responsible in his individual character, on the contracts he may thus make for government. The contrary is firmly settled, *Myrtle v. Beaver*, 1 East, 185; *Rice v. Chute*, id., 579; *Macbeath v. Haldiman*, 1 D. & E., 172; *Unwin v. Woolsey*, id., 674. If the plaintiff is to recover, the defendant must lose the money. The agent of even an individual, if known to be acting for his principal, does not incur any liability; *a fortiori* the agent of government. No surprise is pretended; the plaintiff contracted with his eyes open, and to make a government agent responsible, there must be clear, unambiguous circumstances to show he contracted in his private capacity.

Caines, in reply. That an agent may bind himself by contracts, made for his principal, is admitted.^(a) In addition to the facts already relied on to evince that was the case in the present instance, the conduct of the parties themselves, when intending it to be otherwise, may be referred to. In contracting for building the frigate, Mr. Watson describes himself as agent for and in behalf of the United States. When, therefore, he does not so engage, he must mean to personally undertake. There is a case in *Strange*, (*Thomas v. Bishop*, 2 Stra. 955,) where a cashier of a public company was held answerable, in his private capacity, for a bill accepted by him in his own name, though

(a) Whether he contracts for himself or his principal is a matter of fact for a jury. *Cottrell v. Thorne and O'Hara*, January, 1802. M. S., Kent, Ch. J.

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directed to him as cashier, and drawn upon the funds of the company. Words tantamount to those used in this letter have been ruled to create an individual responsibility. In General Burgoyne's case, cited in *Macbeath v. Haldiman*, the expressions were, that the plaintiff "should be paid at the same rate as the provost-marshal under General Howe," and they were held to work a personal liability. Whenever the rule contended for on the other side has been allowed to operate, the terms of the contract have shown that it was entered into with a reference to government. In *Macbeath v. Haldiman*, the plaintiff's accounts were made out "government debtor;" and the whole of the correspondence stated in the report, manifests the same idea. So in *Unwin v. Woolsey*, the charter-party was expressly "for and on account of government." All the cases referred to have the "same or some other similar [*72] ingredient, distinguishing them from the present.

Under a system so widely extended as ours, to turn over to the administration every man who might furnish that which the country requires, would be ruinous, and impede, if not totally obstruct the public service. Suppose the rations of an army delivered to a commissary, must the recourse be to government alone? The defendant, in giving directions for the models, either acted under the orders of government, or he did not. In the first case, he either has received, or will receive, the amount of the present contest; if so, he suffers nothing by the recovery. In the second, he must have intended to act for himself, and is therefore liable on his contract.

LIVINGSTON, J., delivered the opinion of the court. It is not enough the plaintiff knew the defendant to be navy agent, and that the frigate, whose model he was to make, was to be a public ship of war. Before we send him to government, for redress, it should appear, as well that Watson contracted in his official character, and on account of the United States, as that Sheffield gave credit, and intended to look to the government alone for compensation.

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No one would do any thing for a public agent, were he compelled for every demand, however small, to send his account to the seat of government, or to petition congress for relief. The expense and delay would, in many cases, be greater than the sum due might be worth. Never before was it insisted that every carpenter, ship-chandler, &c., who had supplied materials, or bestowed labor on a public vessel, had no recourse against the person employing him. The consequence would be, either an unwillingness to work for the public, or an exorbitant price would be asked, as an indemnity for the inconvenience of applying to the legislature, or some distant office for a settlement. It is more reasonable that an agent who receives a salary or a commission, should be personally answerable to all who are employed in his department. He trusts government. His acceptance of the office is voluntary. He is compensated for his services; and, so long as he acts within his instructions, he runs no risk of having any proper account disallowed. In ordinary cases he will not be alarmed at a responsibility, which, upon great occasions, such as provisioning an army or the like, may be avoided, by taking care so to model the contract as to leave no doubt that the party was willing, and intended to look, not to him, but to the public. - Where this precaution is omitted, he

[*78] *ought to be liable for everything done at his request, although his character be known, and that the services rendered are on public account. Here, on the contrary, is something very like an express undertaking on the part of Watson to pay. For what other construction can be put on the conclusion of his letter, in which he declares that the plaintiff "shall have the usual allowance from his humble servant?" His public character is not brought to view, nor is the plaintiff referred to government for satisfaction. It must have been upon reasoning like this that the lord chancellor, assisted by two of the judges of the king's bench, proceeded, in the case of *Horsley v. Bell*, 1 Bro. Ch. Rep. 101, *in notis*. They considered the

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commissioners named in an act of parliament for carrying on a certain navigation, personally liable to the undertaker, although he knew they were exercising a public trust, and they had signed the several orders in that capacity.

It is not intended to shake any of the English authorities on this point. Note are to be found in which the party was denied a remedy against his immediate employer, but on the principles here recognised. In *Melchart and others v. Halsey and others*, (3 Wils, 149,) Lord Mansfield thought, from the circumstances disclosed, (but what they were does not appear,) that the forage and provisions furnished the British troops were "upon the public faith and credit of government," and therefore non-suited the plaintiff. So in *Macbeath v. Haldiman*, the plaintiff had made "government debtor for sundries supplied by order of the "lieutenant-governor," and on this circumstance the court laid great stress. The supreme court of the United States, in *Hodgson v. Dexter*, 1 Cranch, 345, regarded the contract as made "with a view entirely to government." When this appears, it will be unjust to charge the officer; but, as the contrary may fairly be inferred as the understanding and agreement between the parties, the plaintiff must have judgment for 300 dollars, and this is the unanimous opinion of the court.[1]

Judgment for the plaintiff for his whole demand.

[1] A superintendent of affairs on the canals of this state, although an agent of the state, is personally liable in an action on the case, for damages sustained by an individual, through the negligence of workmen employed in making repairs. *Shephard v. Lincoln*, 17 Wen. 250.

It seems, that in an action against the superintendent, for non-feazance, it would be necessary to show his office and all other facts necessary to fix upon him the duty of making repairs, as that he had funds, &c., but for non-feazance, it is enough to prove negligence or mismanagement. *Id.*

A superintendent of canals is not personally responsible for work done, or materials found, at his request, for the repair of canals or works connected therewith, unless it is manifest that it was the intention of the parties that he should be personally liable. A naked promise to pay is not enough in such case to create a personal obligation. *Osborne v. Kerr*, 12 Wen. 179.

State agents, by an unauthorized contract, sell its bonds or certificates of

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stocks on credit to an irresponsible purchaser, chargeable with notice of the agent's want of authority; held, that the securities being negotiable, so as to render them valid in the hands of a *bona fide* holder, the state was entitled to an injunction restraining the purchaser from transferring them or their proceeds, and to have a receiver appointed of such as were still under the purchaser's control, together with the proceeds of the residue. *DeLafield v. State of Illinois*, 2 Hill, 159.

The comptroller is the general agent of the state in its fiscal department, and has authority without any express legislative provision, to accept additional collateral security from the debtors of the state. *Jackson v. Brown*, 5 Wen. 590.

A state passed a law for the borrowing of money, and authorized its governor to issue and sell bonds or certificates of stock for the amount borrowed, declaring, however, that the stock should not be sold for less than its par value, and empowering the governor to appoint agents to effect the loan; and a loan was effected upon the terms that the money should be paid by instalments, and at deferred periods, but that interest should commence immediately upon the whole sum, and certificates of stock were issued and delivered to the lender; held, that the contracts were not obligatory upon the state, because the agents had exceeded their authority, first, in selling the stock upon credit, and secondly, in agreeing that the interest should commence running previous to the advance of the money—thus virtually selling the stock for less than its par value, and that, therefore, the state was entitled to a return of the certificates of stock. *DeLafield v. State of Illinois*, 26 Wen. 192; *DeLafield v. State of Illinois*, 2 Hill, 159.

The approval by the governor of the acts of his agents, the receipt and appropriation of a portion of the proceeds of the certificates, and other acts of acquiescence of executive officers of the state, were not enough to amount to a ratification of the contracts; that they could be ratified only by the legislature, and inasmuch as it appeared that the legislature, when specially convened for the purpose, disavowed the contracts, and took measures to recover back the certificates, all pretence of ratification failed. *Id.*

Where a note is received by an officer of the government as collateral security for the payment of a debt due the state, the debtor cannot avail himself of the neglect or omission of the officer to perform the duties which the law, in ordinary cases, imposes upon a party thus receiving a note. *Seymour v. Van Slyck*, 8 Wen. 400.

And even should the officer expressly assume responsibility in relation to such note, as to prosecute it to judgment, it seems that the state would not be responsible for any laches that might occur. *Id.*

There is no difference between the agent of an individual and of the government; the question in all cases is to whom the credit is given. *Rathbun v. Budlong*, 15 J. R. 1; *Mott v. Hicks*, 1 Cow. 513.

An agent of government, known as such, is personally liable, unless it appear that he contracted in his official character, and that the other party gave the credit to the government. *Sheffield v. Watson*, 3 Cal. R. 69. But see *Walker v. Swartwout*, 12 J. R. 444.

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A public officer is liable on an express promise to pay for services rendered to the government. *Gill v. Brown*, 12 J. R. 385.

But where such public agent strikes a balance and promises to pay in writing, adding his character of agent, he is not personally liable. *Fox v. Drake*, 8 Cow. 191.

Aliter, if he has the public funds in his hands.

But where such agent has a discretion in applying the public funds, and after such promise, applies funds in his hands to the payment of junior contracts, this will not render him personally liable. *Id.*

When it does not appear that the agent, in making the contract, acted ostensibly or expressly as a public agent, it will be deemed a private contract. *Swift v. Hopkins*, 13 J. R. 313.

Where the plaintiff's vessel was employed by the defendant, a captain in the navy of the United States, in transporting ordnance and military stores, during the war, and by direction of the defendant was sunk, to prevent the enemy from getting possession; by whom, however, she was subsequently raised and carried off. Held, that the defendant was not liable for the vessel. *Bronson v. Woolsey*, 17 J. R. 46.

A public agent, as a deputy marshal, may be compelled to refund money paid by compulsion, though paid over without notice. *Frye v. Lockwood*, 4 Cow. 454.

And especially, where the suit is defended at the risk and expense of the government. *Id.*

But the rule does not extend to the sum of money obtained by the agent, by compulsion or extortion. *Id.*

Nor especially where the suit against the agent is defended at the risk and expense of the principal. *Id.*

As where money was paid to a deputy marshal of the United States, on a warrant from a pretended court martial, whose proceedings were *coram non judice*, for militia fine, and the money was paid over to the marshal without notice, by whom, or by the secretary at war, the suit was defended. Held, that the action lay against the deputy. *Id.*

Public agents striking a balance and promising to pay in writing, adding their character of agent, are not personally liable. *Fox v. Drake*, 8 Cow. 191.

E. g. commissioners appointed under the statute, (sess. 35, ch. 75, s. 9, 10,) to superintend building the court-house in Tioga county. Otherwise, if they have public funds in their hands. *Id.*

They are not personally liable on the ground that they have made payments on contracts entered into subsequent to the one on which the action is brought, thus exhausting their funds. *Id.*

They have a discretion in applying the public funds, which is not controlled by the order of time in which they have made their contracts. *Id.*

A public agent, in his known official capacity, employing a person to work on account of the government, is not personally liable for the wages. *Walker v. Swarthout*, 12 J. R. 444.

There is no difference between the agent of an individual and of the

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government, as to their liability. The question in all cases is, to whom the credit is given. *Rathbon v. Budlong*, 15 J. R. 1.

Therefore, if the agent, at the time of entering into the contract, makes known the name of his principal, to the person with whom he contracts, he is not personally liable. *Id.*

The officers of the treasury are not bound to receive from the occupant the purchase money of lands sold for quit rents, and fifty per cent. advance, for the purchaser, after a conveyance to the latter, until notice has been given by him to the occupant to pay the same. *The People v. Comptroller of New York*, 1 Wen. 301.

An action will not lie against an officer of the army on his promise to pay a reward offered for the apprehending a deserter, he acting in his official capacity, and as an agent of the government. *Belknap v. Reinhart*, 2 Wen. 375.

 PELTON against WARD.

If a man say to another, "You swore to a lie, for which you now stand indicted," it is actionable. If the count, in an action for words, be insufficient, and the declaration do not contain any introductory matter or *colloquium*, by reference to which they can be rendered so, the inadequacy of the count cannot be made good by a justification and confession of the words in the bar.

THIS was an action for words spoken of the plaintiff, and came before the court on a motion in arrest of judgment.

The declaration consisted of nine counts. The first, second and third, charged the defendant with saying, "[*74] ing, "you swore false." *The fourth, fifth and sixth, with saying, "you swore to a damned lie, and you knew it." The seventh, eighth and ninth, with saying, "you swore to a damned lie, and you knew it, for which you now stand indicted," *innuendo*, that the plaintiff had committed wilful perjury. The defendant pleaded to all the counts, first not guilty, and secondly in bar, a justification, that a court of *oyer* and *terminer*, held at White Plains, in the county of Westchester, the plaintiff was sworn and

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examined as a witness in a cause concerning the building a store on a high-road, and did then and there falsely and corruptly swear, that a part of the store remained on the ground where it had formerly stood, and had not been removed, when, in fact, no part of the store at the time of plaintiff's so swearing remained there, for which an indictment was found and presented against him. Replication, *de injura sua propria absque tali causa*, and issues thereon, with verdicts for the plaintiff on all the pleas, which, however, were entered only on the three last counts, (the first six being confessedly bad,) and entire damages assessed.

Gaines, for the defendant. The action is not maintainable. The counts allege an indictment for that which is not indictable. For simple false swearing, an indictment will not lie. There is not, therefore, any offence charged, for which the plaintiff could be punished. The ground of the present suit is, that there is such an offence imputed. The addition of "for which you now stand indicted," does not make the act more criminal, for a man may be indicted, and yet be innocent. "Thou art a false knave, and thou wast arraigned for two bullocks," *Bayly v. Churrrington*, Cro. Eliz. 279, held not actionable; for, continues the authority, "he saith not he was arraigned for stealing two bullocks, and if the words had been so, yet the words had not been actionable, for a man may be arraigned for felony and yet no felon." So, by Yelverton, J., 1 Balst. 40. "Thou wert arraigned for stealing a horse, when the plaintiff had been acquitted," and ruled that no action would lie. To sustain a suit for words, such as the one now before the court, it is requisite not only that there should be a crime stated, but an affirmation that it was committed. In *Steward v. Bishop*, Hob. 177, the expressions were, "James Steward is in jail for stealing a mare, and other beasts." It was determined they were not actionable, because being in jail "for" doing a thing, does not say it was done. So here, "for which he stands indicted," does not im-

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[*75] ply he was guilty. There is, then, no *word used which states a crime, nor any allegation that it was actually committed. If so, it is not helped by the *innuendo*, "meaning that the said Daniel had committed wilful and corrupt perjury." The office of an *innuendo* is not to supply, but designate.^(a) It is synonymous with a "*prædictum*." *James v. Ruttech*, 4 Rep. 17. Therefore, in *Gurneth v. Derry*, 3 Lev. 166, "thou wast a forsworn man, and didst take a false oath against me, before Justice Scawen, *innuendo*, John Scawen, a justice of the peace," it was determined the *innuendo* did not aid, and that the declaration was insufficient. The same principle is recognised in *Holt v. Scholefield*, 6 D. & E. 691, where it is said it ought to be shown either by introductory matter or averment, that the forswearing was in some judicial proceeding. Where it appears in the introductory part, it is good. *Brumrig v. Hanger*, Hard. 151. So, if it be the result of necessary implication. 6 D. & E. 691. If it be said that it arises here from the word indicted, then it ought to have been averred. The rule is this: when the latter words are relied on to explain the first, and give them their criminality, if they be connected with the former by the word *for*, they must be followed by an averment: when by the word *and*, they need not. *Painter v. Warne*, 2 Bulst. 142.^(b) Therefore, in the present case, the plaintiff should have averred that he had not been indicted. The case of *Gilbertin v. Rowe*, 1 Roll. Abr. 40, pl. 8, may be cited against us. But, taken with the above distinction, it is in our favor. The words there used were: "Thou art a forsworn knave, *and* wast indicted by twelve men, *and* hast com-

(a) The business of an *innuendo* is, by a reference to preceding matter, to fix more precisely the meaning of it. Per Lord Mansfield, in *The King v. Aylet*, 1 D. & E. 70. See *Res v. Alderton*, Say. 280; *Res v. Matthews*, 9 Sta. Tri. 682; *Res v. Horne*, Corp. 672.

(b) The reason is, the word "and" is held to be cumulative. See *Whitacre v. Hillidel*, Alleyh. 11; *Yearworth v. Pierce*, *ibid.* 31; and *Wainwright v. Whitley*, Sty. 115, where the same distinction is taken, and the case of *Clerk v. Gilbert*, Hob. 331, *contra*, denied to be law.

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pounded for it." The declaration, therefore, is bad for these reasons: 1. The words do not state any crime; 2. If they do, it is not charged to have been committed; 3. The want of so doing is not aided by the *innuendo*; 4. Nor does it arise by necessary implication; and, 5th. If it does, it should have been followed by an averment. But it may be said that the defect, if any, is cured by pleading over. This, however, is a defect in substance, and "if the count be defective in substance, the bar cannot make it good." *Doctor Bonham's Case*, 8 Rep. 120, b. The point, however, is decided. "In an action for words, though the defendant justify and acknowledge the words, this does not aid the declaration." *Badcock v. Atkins*, Cro. Eliz. 416. Nor is it helped by the verdict. *Rushton v. Aspinall*, Doug. 679. In the next place, entire damages are assessed upon separate issues and several verdicts. "Every count is to be considered as a distinct declaration." *Hill v. Lewis*, 1 Salk. 133. "You may as well *assess entire damages on separate actions [*76] as on separate issues. "If several issues are joined on several points, and found for the plaintiff, and damages assessed entire, the judgment is reversible, for being several issues, the jury might have assessed the damages severally, viz., for each issue several damages." *Bedel and Moore's Case*, 1 Leon. 171. The entries in all the books of precedents are in conformity to this. Lill. Ent. 428.

KENT, Ch. J. The last point is settled by a case in 5 Burrows. It was formerly the practice to enter separate damages on each issue, but this was found inconvenient, and in this court they have been uniformly entered as in the present case. As to the words used, they must be taken in the same sense as in common parlance they would be received. The doctrine of *mitiori sensu* has long been exploded. No man but would interpret the expression in the declaration as conveying a charge of perjury.

Emott, contra. The defendant has added enough to show

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the words were so intended. In *Gilbert v. Rod*, 3 Bulst. 394, the allegation of being forsworn was followed by the same expressions as in the present case, and held to be actionable. But if it were otherwise, the pleading and verdict would make it good. The defendant by his bar has confessed the words, and shown that they were uttered with an intention to impute perjury. He sets forth the court in which the forswearing took place, and thus gives certainty to the declaration. In a similar action this was held to cure the uncertainty of the count.

In *Drake v. Corderoy*, Sir W. Jones, 307, Cro. Car. 288, (a) the defendant justified by setting forth a forswearing in a court of quarter sessions, and it was ruled to make good the uncertainty of the declaration. *Tuke and Condies Case*, (b) cited in *Osborne v. Brooke*, (c) *Alleyne*, 7, is to the same point.

Caines, in reply. The authority from 3 Bulstrode is the same as that from Rolle, and must be received with the explanation already taken. On the other points the decision must turn according to the weight of the cases cited.

SPENCER, J., delivered the opinion of the court. The first inquiry will naturally relate to the charge in the three

(a) In this case the plaintiff, by introductory matter in his own declaration, showed that the words were spoken of a forswearing at the sessions where he took an oath, and after stating the charge of having forsworn himself, omitted the *innuendo*, (meaning the said oath taken by him,) the defendant in his bar confessed the words, and that they were said of the oath there taken, and this was held to make good the uncertainty occasioned by the want of the *innuendo*. Observe, however, that in this case it appeared by introductory matter in the declaration, that the forswearing was in a judicial proceeding. The authority, therefore, is perfectly within the rule as laid down in *Holt v. Scholefield*, 6 D. & E. 691; and *Brumrig v. Hanger*, Hard. 151.

(b) A contra decision is also stated.

(c) The words were, "Captain Osborne is forsworn, and his oath appears upon record." This the court held to be equal to saying he is forsworn upon record. See *ante*, 75, the note upon the word "and" being cumulative.

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last counts. The office of an *innuendo* is to contain and design the person who was named in certain before.[1] "It cannot alter the matter or sense of the words themselves." It cannot extend the words, by an imagination of an intent not apparent by any precedent words to which the *innuendo* should refer; "in effect it stands in lieu of a **prædictum*." This doctrine is laid down in the [*77] case of *James v. Rutlegh*, 4 Rep. 17, and has been the received law ever since. In the case of *Oldham v. Peake*, 2 Black. Rep. 961, it is decided that an *innuendo* cannot introduce new matter, but may ascertain the meaning of the old. In that case the declaration stated a *colloquium* concerning the death of Daniel Dolly; the words were, "you are a bad man and I am thoroughly convinced you are guilty, (meaning of the murder of the said Dolly,) and rather than you should want a hangman, I would be your executioner." The court held that the word "death" must be understood to mean "murder," because it was such a death as the plaintiff might be liable to be hanged for. This authority bears strong analogy to the present case. The words charge the plaintiff with swearing knowingly to a "damned lie, for which he stood indicted." The words in this instance can mean nothing less than perjury; for it

[1] Mr. Starkie, (Tr. on Slander, vol. 1, p. 418,) explains the uses of an *innuendo* as follows:

"An *innuendo* may be defined to be an averment which explains the meaning of the defendant's publication by reference to facts previously ascertained by averment or otherwise." 2 Salk. 513; 1 Lord Ray. 256; 12 Mod 139; 1 Will. Saund. 243.

"An *innuendo* is frequently necessary, where the language of the defendant is apparently innocent and inoffensive, but where, nevertheless, by virtue of its connection with known collateral circumstances, it conveys a latent and injurious imputation."

"Where, from the ambiguity of the defendant's expressions, it is doubtful who was meant, it is the proper office of the *innuendo* to render the allusion clear, by specifically pointing out the meaning. As where but one or two letters of the name are expressed, or the plaintiff is libelled under a fictitious or borrowed name, or where the libel is couched under a fable or allegory, whose tendency and meaning it is necessary to explain by reference."

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was an allegation that the plaintiff had knowingly sworn to such a lie as rendered him obnoxious to an indictment, which could only be for perjury. If the *innuendo* was not true, it was competent to the jury to say so; but they have affirmed it on grounds which strike me as substantial.

The plaintiff's counsel has called in to his aid the plea of justification, as rendering the intent to charge perjury clear and certain; and there are authorities which seem to sanction a reference to a plea with that view; but I cannot accede to the doctrine. The case of *Badcock v. Atkins*, Cro. Eliz. 416, appears to me to be most consistent with principle. The court there held that the declaration, which was insufficient in substance, could not be helped by the plea.^(a) The question in that case was, as to the certainty of the person slandered, and plea justified the words, and still the declaration was holden bad. The plaintiff, to sustain an action, must have a complete right to bring it at its commencement. But, on the former ground, my opinion is, that the defendant take nothing by his motion. I think the pleadings in this case highly censurable. Instead of one plea of justification to all the counts, there are the same pleas to each count. There are also nine counts for substantially the same words, and a special replication to each of the pleas. The attorneys on both sides are in fault, and in the taxation of costs the plaintiff ought to be allowed for only two of his counts, and one replication; and the defendant's attorney, as against his client, to be allowed but for one of his special pleas.

[*78] *KENT, Ch. J. I concur in the opinion delivered.

LIVINGSTON, J. I am unfortunate enough to differ from the court.

If the words used be not in themselves actionable, the judgment must, in my opinion, be arrested, notwithstanding

(a) See *Vaughan v. Havens*, 8 John's Rep. 119, where the court, in an opinion delivered by Spencer, J., seem to acknowledge *Drake v. Cordway* to the full extent for which urged here by Emott.

ing the plea of justification, on which the plaintiff so much relies, as evidence of the defendant's intention or meaning to charge him with perjury. It is the import of the words themselves, and not the defendant's intention, which is the criterion of their being actionable or not. This meaning cannot be assigned to them merely by an *innuendo*, or depend on a secret intention, but must be collected either from the criminal sense in which the expressions are usually understood; or, from the *colloquium* which led to them, it must appear they could have no other meaning. Let a man's intention be ever so mischievous or malicious, if his reproaches, however strong, impute no crime, nor bring the party of whom they are uttered into danger of legal punishment, he can be no more responsible than one who intends, but does not perpetrate a crime. Nor will any subsequent explanation by him confer a right of action for words not actionable at the time they were spoken, or in the manner in which they were used. This explanation itself may be the ground of a suit, as being a new slander, but it can never make that actionable which was not so before. Were one to declare against another for calling him a fool, would the plaintiff be permitted to show that the defendant intended to call him a thief? Nay, would the defendant's own confession in open court to that effect support a declaration of this kind? The action is brought for the injury which the words are calculated and supposed to have produced; not for the intention from which they proceed. This is precisely the case here. The defendant had charged the plaintiff with swearing to a lie. These words, it is admitted, are not actionable, when not applied to swearing in a judicial proceeding, but are laid generally, without any *colloquium* from which it can appear that they were used with reference to some proceeding wherein the plaintiff had been examined as a witness. It must be seen, by apt words in the declaration, that the defendant referred to such proceeding, or, whatever his intention may have been, those who heard them could only consider the plaintiff as

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a liar, which, however discreditable or disgraceful, would not have given a right of action, notwithstanding the case in 1 Bulst. 40. Reasonable as the rule there laid down may be, *that words, tending to the infamy, discredit or disgrace of the party," are actionable, the law is certainly otherwise. They must contain an allegation of "some crime liable to punishment, some capital offence, or other infamous crime, misdemeanor," &c. As those, then, who were present when this supposed slander was propagated, must have formed their opinion from what fell from the defendant, they could not suppose he meant to charge the plaintiff with perjury, unless he had made use of other expressions than those which are set forth. If, then, there were no injury, or cause of action at the time of filing the declaration, how is it possible that the plea, which, perhaps, will never be seen or heard of by those to whom the words were addressed, can confer one, and that too by relating so far back. I am apprized, however, that the plaintiff is not altogether without authority on this point. It is that of *Drake v. Corderoy*. The defendant had there said of the plaintiff that he was forsworn, without mentioning in what court or on what occasion. In his plea of justification, he stated in what court he took the oath, and that it was false. The court there say that "the uncertainty of the declaration is cleared up by the defendant's expressing in his plea, that he intended to speak of the oath he had taken in that particular court."

This case proceeds on a supposition that the intention with which words are spoken is material. It may be so as it respects the measure of damages, but not as it regards the right to recover. No malice or evil intention can render actionable words in themselves innocent. I have examined every case cited in the margin of this one, in support of the decision, (and they are numerous,) but not one of them is in any respect like it. They are cases on contracts where one party or the other, in the course of pleading, has admitted some fact which was material, and which

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the court would not afterwards permit him to contest or deny: but here, the fact admitted by the justification is immaterial, because slander can never consist in what a man intends to publish, but in what he does actually declare; and so it was determined in *Badcock v. Atkins*, which is a very strong decision in favor of the defendant, and at open war with the one just examined. It was doubtful, from the declaration, whether the words spoken applied to the plaintiff. This fact, however, was admitted by the plea, but the court say, "the declaration was not good, and although the defendant by his plea confesses that he intended them of the plaintiff, yet that shall not help the *declaration which is insufficient." This case, [*80] it is true, is many years older than *Drake v. Cordero*. It is not, however, on this account that I give it a preference, especially as it may be considered as overruled by the latter judgment, but because it appears to me more reasonable, and more agreeable to common sense than the other, for the more we reflect on the subject, the less will we be able to conceive how any one can be affected or injured in his reputation, by slander which consists in mere intention, without any overt expressions to carry such intent into effect. In the case of *Oldham v. Peake*, there was a *colloquium* concerning the death of one Dolly, and the manner of the defendant's charging the plaintiff with it was equivalent to a charge of murder.

But if the plea of justification be not a sufficient cause for not arresting the judgment, it is said the words are actionable, inasmuch as the defendant alleged that the plaintiff stood indicted for what he then charged him with. Here we must again recur to the words, and if they do not contain an imputation of a crime or offence, the allegation of an existing indictment will not alter the case. It is very possible, that a person, from ignorance in a grand jury or other cause, may be indicted for a matter not criminal, but unless what is charged be so, it is no slander. Were one to say to another, you are a Mahometan, or a jacobin, for

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which you stand indicted, would these words, on account of such addition, be actionable? Certainly not. Now, as no man can legally be indicted or punished for being a liar, his being called so, and being charged with being indicted as such, can give him no right of action any more than his being charged with being indicted for any other immorality not punishable by law. I am not for extending the action for words, but for confining it as much as possible within its present limits. Abusive expressions, which expose a man to no punishment, are beneath the dignity of the law, and unworthy of legal cognizance. A man of character cannot be affected by them, and he who has none, should not have his angry passions gratified by an appeal to courts of justice, whose time may be much more usefully employed in attending to other matters. The judgment in my opinion must be arrested. I concur, however, in the opinion of Mr. Justice Spencer, as to the pleading.[1]

[1] A charge of false swearing is actionable where it necessarily conveys to the mind of the hearer, an imputation of perjury, otherwise not; *Sherwood v. Chase*, 11 Wend. 38; so of forgery; *Gorham v. Ives*, 2 Wend. 534; *Jacobs v. Tyler*, 3 Hill, 572. Slander lies for saying of another, "he has sworn falsely, and I will attend the grand jury respecting it," without a colloquium showing the speaking of the words, to refer to proceedings in which perjury could have been committed; *Gilman v. Lowell*, 8 Wend. 573. Though the words, you have sworn to a lie, are not in themselves actionable; yet, if it be averred in the declaration, that the words were spoken of and concerning the plaintiff, and of and concerning a trial, and the evidence given by the plaintiff in a cause pending in a court, it contains a sufficient cause of action. *Crookshank v. Gray*, 20 J. R. 344. The materiality of the testimony in reference to which they were spoken, though averred in the declaration, need not be proved, but will be presumed. *Jacobs v. Tyler*, 3 Hill, 572.

"In an action for libel or slander, it shall not be necessary to state in the complaint, any extrinsic fact for the purpose of showing the application to the plaintiff, of the defamatory matter, out of which the cause of action arose; but it shall be sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff shall be bound to establish, on the trial, that it was so published or spoken." Code, s. 141. This section does not dispense with the necessity of an averment or innuendo, when it becomes essential to show the meaning

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THOMPSON, J., gave no opinion, not having heard the argument.

TOMPKINS, J., had been concerned.(a)

Motion denied.

*BROWN *against* SMITH.

[*81]

On a verdict for one mill, no judgment can be rendered, and if it be entered for the costs only, it is error. Whenever the jury give damages, costs follow by the statute, and therefore need not be found.

ON *certiorari* from a justice's court, in trespass *quare clausum fregit*, the errors relied on were: 1st. That the verdict being for one mill, no judgment could be, or in fact was, rendered upon it; 2d. That as no costs were found by the jury, the justice was not warranted in giving judgment for any.

Sanford, for the plaintiff. By our act "relative to the money of account of this state," 1 Rev. Laws, 250, c. 52, s. 2, all fractions of money, less than cents, are, in judicial proceedings, to be rejected. The verdict, then, could not be legally received, and if so, there was nothing on which to found a judgment. On the second point, though it may be said that the finding of costs is mere form, and the court will order it to be done in order to carry those of increase,

of the words themselves; and the fact that the code dispenses with the averment of extrinsic facts before necessary to point the application of the words to the plaintiff, justifies the inference that in other respects the rule formerly prevailing remains unchanged. *Pike v. Van Wormer*, 5 Pr. R. 171, 174, 175; *Anon.*, 3 How. 406; *Duel v. Agan*, 1 Code Rep. 134; *Wood v. Gilchrist*, *id.* 117.

(a) See *Hopkins v. Beadle*, 1 Caines' Rep. 34, and note there.

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yet this very circumstance shows they are essential. They are peculiarly so in this case, which is an action sounding in damages. If not found, they cannot be assessed by the justice, and a judgment rendered for them alone.

Bogert, contra. The statute relative to the money of account was passed antecedent to the 10^l. act, and as inferior jurisdictions take nothing by implication, the justice's court is not affected by it. Besides it speaks only of judgments and decrees, not of verdicts, and the *judgment* is in dollars and cents. Another answer may be given, that the errors are in form only, and therefore not to be now regarded, as after verdict, they are cured by the statute of jeofails.

Per Curiam, stopping Bogert. On the second point it is unnecessary to say anything. The jury need not find costs; they are given by the statute, wherever damages are found. But the judgment must be reversed. Without any law, none could be given on such a verdict; it is a nullity, and could not be the basis of any judgment.^(a) In that which is now rendered, the justice is obliged to reject the verdict, for there is no judgment as to the mill. It is for costs only, and if carried into effect there could be no levy for the verdict. There is no such currency as the sum given.[1]

Judgment of reversal.

(a) See Finch's Law, 29; *Shore v. Thomas*, Noy's Rep. 4, contra; *Marsham v. Buller*, 2 Roll. Rep. 21; Vide also 2 Bos. & Pull. 36; *Governor, &c. of Harrow School v. Alderton*.

[1] The judgment is the test by which the right to costs is to be determined. *Godfrey v. Van Cott*, 13 J. R. 345.

"In all judgments or decrees rendered by any court of justice, for any debt, damages, or costs, and in all executions issued thereon, the amount shall be computed, as near as may be, in dollars and cents, rejecting lesser fractions; and no judgment or other proceeding shall be considered erroneous for such opinions. 1 R. S., tit. 3, part 1, ch. 19, s. 2.

As to judgment in justices' courts, see Waterman's N. Y. Treatise.

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***Codd ET UX. against HARISON AND OTHERS. [*82]**

Practice in partition.

IT was ruled, that in partition the practice is the same, when unopposed, as in other cases, and therefore the notice and affidavit of service only need be read.(a)[1]

(a) See 1 Caines' Rep. p. 7, n. (4.)

[1] The New York revised statutes upon the subject of Partition, provide that: When several persons shall hold and be in the possession of any lands, tenements or hereditaments, as joint tenants, or as tenants in common, in which one or more of them shall have estates of inheritance, or for life or lives, or for years, any one or more of such persons, being of full age, (vide 8 Cowen, 361.) may apply by petition to the supreme court, or to the court of common pleas of the county, or the mayor's court of the city, where the premises are situated, for a division and partition of such premises, according to the respective rights of the parties interested therein, and for a sale of such premises, if it shall appear that a partition thereof cannot be made, without great prejudice to the owners. 2 R. S. 317, a. 1. And the provisions of this statute are equally applicable in cases of partition by or against the people. 1 R. S. 307, a. 65; 2 R. S. 331, 332, ss. 92, 93. But a party who has merely a future contingent interest in an undivided share of real estate, cannot sustain a suit for a partition of the property. 2 Paige, 387.

If it shall be represented to the court, by any party intending to make such application, that there are any minors, who should be parties to the proceedings thereon, and it shall be satisfactorily proved to the court, that at least ten days notice has been served on such minors as reside within this state, or upon their general guardians, of an intention to apply to such court for the order herein mentioned, such court shall thereupon appoint a suitable and disinterested person to be guardian for one or more of such minors, whether the said minors shall reside in or out of this state, for the special purpose of taking charge of the interests of such minors, in relation to the proceedings for a partition. 2 R. S. 317, a. 2.

Every guardian so appointed, shall, before entering upon the execution of his duties, execute a bond, in such penalty, and with such surety, as the court shall direct, to the people of this state, conditioned for the faithful discharge of the trust committed to such guardian, and to render a just and true account of his guardianship, in all courts and places when thereunto required; and before any rule to plead, or any other subsequent rule or order shall be made, the court shall be satisfied that such bond has been executed and filed in the office of its clerk. Id. a. 4.

The guardians so appointed, and who shall give bond as hereinafter di-

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rected, shall represent their respective minors in the proceedings for partition hereby authorized, and their acts in relation thereto, shall be binding on such minors, and shall be as valid as if done by such minors, after having arrived at full age. Id. s. 3. Under this statute it is indispensably necessary that a guardian should be appointed; and the appearance of the general guardian of an infant party is of no avail. 1 Johns. Rep. 509; 10 Johns. 486.

The petition for a partition or sale of any such real estate, shall contain the following matters: 1. It shall particularly describe the premises sought to be divided or sold; 2. It shall set forth the rights and titles of all persons interested therein, so far as the same are known to the petitioner, including the interest of any tenant for years, for life, by the curtesy, or in dower, and the person entitled to the reversion, remainder or inheritance, after the termination of any particular estate therein, and every person who, by any contingency contained in any devise, grant or otherwise, may be or become, entitled to any beneficial interest in the premises: and 3. It shall be verified by affidavit. 2 R. S. 318, s. 5. And the rights of the parties must be fully shown, otherwise the petition cannot be sustained. 9 Cowen, 530; *et vide* 8 Johns. 558.

Every person having any such interest as aforesaid, whether in possession or otherwise, and every person entitled to dower in such premises, if the same has not been admeasured, may be made party to such petition. 2 R. S. 318, s. 6. And in case any one or more of such parties, or the share or quantity of interest of any of the parties be unknown to the petitioner, or be uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be a contingent remainder, so that such parties cannot be named, the same shall be set forth in such petition. Id. s. 7.

It shall not be necessary, in the first instance, to make any creditor, having a lien on the premises in question, or on any part thereof, by judgment, decree, mortgage or otherwise, a party to the proceedings, nor shall the partition of the premises alter, affect or impair the lien of such creditors, except in the cases provided for in the next section; Id. s. 8; 3 R. S. 155, Appendix; and where the lien is on the undivided interest or estate of any of the parties, such lien, if partition be made of the premises, shall thereafter be a charge only on the share assigned to such party, and such share shall be first charged with its just proportion of the costs of the proceedings in partition, in preference to any such lien. 2 R. S. 318, s. 9.

But the parties, presenting such petition, may, at their election, make every creditor having a specific lien on the undivided interest or estate of any of the parties, by mortgage, devise, or otherwise, a party to the proceedings; and in such case, the petition shall set forth the nature of every such lien or incumbrance. 3 R. S. 155, Appendix.

A copy of such petition, with notice that the same will be presented to the court, on some certain day in term, (but no place need be mentioned, 5 Cowen, 281,) shall be served forty days previous to such term, on all the

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parties interested in such lands or tenements, who shall not have joined in such petition, and on the guardians of such as are minors, who shall have been appointed in the manner herein before directed. 2 R. S. 318, sec. 10. The notice of such application shall be directed to all the parties who are known, and whose interests are known, and to those who are known but whose interests are uncertain, contingent or unknown, by name, and generally to all others unknown, having or claiming any interest in such premises. 2 R. S. 319, sec. 11.

If any parties, having such interest, are unknown, or if either of the known parties, whether minors or of full age, reside out of this state, or cannot be found therein, and such facts to be made appear to the court by affidavit, the petition and notice may be served on such unknown or absent party, by publishing the same for three months previous to the presentation of such petition, once in each week, successively, in the state paper, and in a newspaper printed in the county where the premises are situated, if there be any, and if there be none, then in a newspaper printed in the city of New York, which shall be equivalent to a personal service on such known or unknown parties; or instead thereof, with respect to any known absent party, such petition and notice may be served personally, out of this state, forty days previous to its presentation, without publishing the same. Ibid. sec. 12. And a judgment in partition, under the statute, where part of the premises belongs to owners unknown, is not valid, unless it appear *upon the face of the record*, that the affidavit required by the statute, that the petitioner or plaintiff in partition is ignorant of the names, rights or titles of such owners, was duly presented to the court, and, that the notice also required in such cases, was duly published. 11 Wendell, 647.

Upon the presentation of such petition, and due proof being made of the service or publication thereof, with notice as aforesaid, and of the facts justifying the mode of publication, the court shall, by rule, order the parties interested in the premises, and who did not join in such petition, whether known or unknown, and whether the share or interest is known or unknown, or whether they are, or may become, entitled to any beneficial interest in the premises, in reversion, remainder, or by any executory devise, contingency or otherwise, to appear and show title to the proportions which they may claim, of the premises set forth in the said petition, and to answer the said petition within the usual time allowed for pleading in the said court. 2 R. S. 319, sec. 13.

Notice of such rule, and all other notices in any subsequent proceedings, unless otherwise specially directed, may be served by affixing the same in the office of the clerk of the court, which shall be equivalent to personal service on the party to be affected thereby. Ibid. sec. 14.

Any person having any interest in the premises, or having any claim by which he may become interested at any future time, in reversion, remainder, or by any executory devise, contingency, or otherwise, and whether such interest, be present and vested or contingent, and whether such parties or their interest be known or unknown, may, within the time prescribed in

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such rule, or within such further time as the court may allow for the purpose, appear and answer to the said petition as to a declaration. If such person be not named as a party in the petition, he may be admitted to appear and answer the same, as a defendant, by the court or by any judge thereof in vacation, upon his petition accompanied by an affidavit of his interest. *Ibid.* sec. 15.

Under the provisions of the former act, (1 R. L. of 1813, sec. 3,) great difficulty was experienced, when defendants were improperly joined, so as to prejudice a *bona fide* defendant, who had no means at law of contesting the claims of a co-defendant: and doubts existed also, as to whether the right of the petitioner could be tried in this action: it being supposed that as no execution was given to enforce the division, the question of right must be disposed of in an action of ejectment to recover possession. 9 Cowen, 580; S. C., 5 Cowen, 295. In order, therefore, to obviate these doubts, and to carry out the equitable principle of this action, so as to protect the rights of all the parties, and avoid an unnecessary multiplicity of suits, it is now provided that any party appearing, may plead either separately or jointly, with one or more of his co-defendants, that the petitioners, or any of them, at the time of presenting such petition, were not in the possession of the premises in question, or any part thereof, (under which adverse possession will be a bar; 9 Cowen, 304;) or that the defendants, or any of them, did not hold the premises together with the petitioners, at the time of the commencement of the proceedings, as alleged in the petition; (and for this purpose a parol partition made between tenants in common, carried into effect, by each party taking possession of his share, is binding; 4 Johns. 202; *et vide* 17 Johns. 221;) and under the last mentioned plea, the defendant pleading it, may give notice of any special matter to sustain such plea, and may give evidence thereof on the trial, as if the same had been pleaded. 2 R. S. 320, s. 16. And replications and further pleadings may be had between the parties respectively, according to the practice of the court, as in personal actions, until an issue or issues in law or in fact, be joined between the said parties, or some of them. *Ibid.* s. 17.

Whenever the joint tenancy, or tenancy in common of any defendant, shall be denied by a co-defendant, and it shall become necessary to determine the same, in order to effect a complete and final partition, so far as the rights of the parties are concerned, the court may direct an issue to be formed on the record, and may direct the jury to inquire into, try and determine, as well the tenancy of the defendant so denied, as the other issues joined on such pleadings. *Ibid.* s. 18.

All issues so joined shall be tried, and the like proceedings for the trial thereof shall be had, and bills of exceptions may be taken, and demurrers to evidence filed, and the court may set aside verdicts and grant new trials therein, as in personal actions; and either before or after the trial of any such issue, the court may permit the petition and all subsequent proceedings to be amended, so as to represent truly the rights claimed by any party. *Ibid.* s. 19. And they may allow any amendment of the pleadings or pro-

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ceedings, so as to make defendant thereto, any person who shall have appeared in the course of the proceedings, to be interested in the premises, by any will, deed or grant, from any person who is a defendant in such partition, and who might originally have been made defendant, if his interest had then existed or been known; but no person shall be so made defendant, without forty days' notice of the motion to that effect being personally served on him, or published three months, as in the case of an original application. *Ibid.* s. 20.

After any such amendment, any party whose rights are affected thereby, and who has not had an opportunity to sustain his claim, shall be entitled to have an issue made up and tried, to determine such right; and the court may, after an amendment in any other case, where it may be deemed proper, order a trial to be had. *Ibid.* s. 21.

If the default of any of the defendants, whether known or unknown, shall have been entered, the court shall require the petitioners to exhibit proof of their title, and an abstract of the conveyances by which the same is held. Such proof may be taken in open court, or by the clerk thereof, on a reference for that purpose. And in either case, the proof given and the abstract furnished, shall be filed with the clerk. 2 R. S. 321, s. 22. The court shall ascertain, from the proofs so taken, in case of a default, or from the confession, by plea, of the parties, if they appeared, or from the verdict of the jury, by which any issue of fact shall have been tried, and shall declare the rights, titles and interest of the parties to such proceedings, plaintiffs as well as defendants, so far as the same shall have appeared; and shall determine the rights of the said parties in such lands, tenements or hereditaments, and give judgment that partition be made between such of them as shall have any right therein, according to such rights. *Ibid.* s. 23. Under these two sections, the court, in a recent case, have said, that the proof they will require in cases of this kind, will be such, as in an action of ejectment would be considered as establishing a *prima facie* right in a plaintiff, to recover the premises claimed by him, and that the practice which they will adopt in relation to these cases, will be to refer the taking of the proofs to the clerk, whose report, together with the abstract of title furnished by the plaintiff, must be submitted to the court. 3 Wendell, 436. If, after the trial of any such issues, or after judgment by default, confession or otherwise, against those parties who are known, the part or interest of any parties who shall not have pleaded in the cause, whether known or unknown, in and to such premises, shall not have appeared by the evidence in the cause, then the said court shall give judgment that partition be made, so far as the rights or interests of the parties who are known, and who have appeared in the said cause, have been ascertained, and the residue of the premises shall remain for the parties whose interests have not been ascertained, subject to division between them at any future time. 2 R. S. 321, s. 24.

Whenever any judgment of partition shall be rendered as above, the court shall, by rule, appoint three reputable freeholders, commissioners, to make the partition so adjudged, according to the respective rights and interests of

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the parties, as the same were ascertained and determined by such court; and in such rule the court shall designate the part or shares which shall remain undivided, for the owners whose interests shall be unknown and not ascertained. 2 R. S. 321, a. 25. If the persons so appointed commissioners, or either of them, shall die, resign or neglect to serve, the court may, from time to time, appoint others in their places. Id. a. 26.

The commissioners, before proceeding to the execution of their duties, shall severally be sworn or affirmed, before any officer authorized to take affidavits, honestly and impartially to execute the trust reposed in them, and to make partition, as directed by the court, which oath shall be filed with the clerk of the court, at or before the coming in of the report of such commissioners. Id. a. 27.

The commissioners shall forthwith proceed to make partition, according to the said judgment of the court, unless it shall appear to them, or any two of them, that partition of such real estate cannot be made, without great prejudice to the owners thereof, in which case, they shall make a return of such fact to the court, in writing, under their hands. 2 R. S. 322, a. 28. In making partition, the commissioners shall divide the said real estate, and allot the several portions and shares thereof to the respective parties, quality and quantity relatively considered by them, according to the respective rights and interests of the parties so adjudged by the court, designating the several shares and portions by posts, stones, or other permanent monuments; and they may employ a surveyor, with the necessary assistants, to aid them therein. Id. a. 29. If, however, the defendants wish to retain their proportions of the estate undivided, partition may be made accordingly, by setting off to the plaintiff his share in severalty, and to the defendants jointly. 2 Wendell, 443.

The commissioners shall make a full and ample report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their trust, and describing the land divided, and the shares allotted to each party, with the quantity, courses and distances of each share, and a description of the posts, stones or other monuments thereof, and the items of their charges. 2 R. S. 322, a. 30.

And all the commissioners must meet together in the performance of any of their duties; but the acts of a majority so met shall be valid. Id. a. 31.

The expenses of the commissioners, including the expenses of a surveyor and his assistants, when they shall be employed, shall be ascertained and allowed by the court; and the amount thereof, together with the fees allowed by law to the commissioners, shall be paid by the petitioners, and shall be allowed to them as part of the costs to be taxed. Id. a. 32. The fees usually allowed, are three dollars a day. 8 Cowen, 115. But no action can be brought by the commissioners for their fees, until they have been taxed, by the court. 5 Cowen, 213.

The report shall be proved or acknowledged before some officer authorized to take the proof of deeds, in the same manner that deeds are required to be proved or acknowledged, to entitle them to be recorded. Vide 1 R. S. 756,

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a. 4; and shall be filed in the office of the clerk of the court. 2 R. S. 322, a. 33.

On good cause shown, the court may set aside the report, and appoint new commissioners, as often as may be necessary, who shall proceed in like manner as above directed. 2 R. S. 322, a. 34. Upon any report of the commissioners being confirmed by the court, judgment shall thereupon be given, that such partition be firm and effectual forever, and such judgment shall be binding and conclusive,—

1. On all parties named therein, and their legal representatives, who shall, at the time, have any interest in the premises divided, as owners in fee, or as tenants for years, or as entitled to the reversion, remainder or inheritance of such premises after the termination of any particular estate therein, or who, by any contingency contained in any will, or grant, or otherwise, may be or may become entitled to any beneficial interest in the premises, or who shall have any interest in any undivided share of the premises, as tenant for years, for life, by the curtesy, or in dower:

2. On all persons interested in the premises, who may be unknown, to whom notice shall have been given of the application for partition, by such publication as is herein before directed: and,

3. On all other persons claiming from such parties, or persons or either of them. Ibid. sec. 35. But such judgment and partition shall not affect any tenants, or persons having claims as tenants, in dower, by the curtesy, or for life, to the whole of the premises which shall be the subject of such partition; *vide* 15 Johns. 319; nor shall such judgment and partition preclude any person, except such as are specified in the last section, from claiming any title to the premises in question, or from controverting the title or interest of the parties between whom such partition shall have been made. 2 R. S. 323, sec. 36.

If the commissioners shall report to the court, that the lands, tenements or hereditaments, of which partition shall have been directed as aforesaid, are so situated, or that any distinct lot, tract, or portion thereof, is so situated, that a partition thereof cannot be made, without great prejudice to the owners of the same; and if the court shall be satisfied that such report is just and correct, the court may thereupon, by a rule to be entered on the filing of the said report, order the commissioners to sell the premises so situated, at public auction, to the highest bidder; 2 R. S. 323, a. 37; and they shall direct, in such order, the terms of credit which may be allowed, for any portions of the purchase money of which it shall think proper to direct the investment, and for such portions of such purchase money, as are required by statute, (*post*) to be invested for the benefit of any unknown owners, any infants, any parties out of the state, or any tenants for life, in dower or by the curtesy. Ib. a. 38. The portions of the purchase money for which credit shall have been so allowed, shall always be secured at interest, by a mortgage of the premises sold, by a bond of the purchaser, and by such other security as the court shall prescribe. Ib. a. 39. The commis-

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sioners may take separate mortgages and other securities, for such convenient shares or portions of the purchase money, as are directed by the court to be invested as aforesaid, in the name of the clerk of the court and his successors in office, or any one of such clerks, and for such shares as any known owner of full age shall desire to have so invested, in the names of such owners; *Ib.* a. 40; and upon such sales being confirmed, as hereinafter mentioned, the said commissioners shall deliver such mortgages or other securities, to the clerk of the court, or to the known owners whose shares were so invested. 2 R. S. 324, a. 41.

Formerly the right of an incumbrancer could not be affected, by a sale of lands in partition; neither could he be made a party to the suit. 1 Paige, 469; 1 Hopk. 501. Now, however, before making the order for sale, where creditors having specific liens, have not been made parties, the court, on the motion of either party, shall direct the petitioner to amend his petition, by making every creditor having a specific lien, on the undivided interest or estate of any of the parties, by mortgage, devise, or otherwise, a party to the proceedings; and shall direct the clerk of the court to ascertain and report whether the shares or interests in the premises, of the parties in such suit, or any of them, are subject to any general lien or incumbrance by judgment or decree. 3 R. S. 155, Appendix. But an order for sale may be made, without a reference to the clerk to search for incumbrances and liens, unless such reference be asked for by one of the parties. 12 Wendell, 269. The clerk to whom such reference shall be made, shall immediately thereafter, cause a notice to be published once in each week for six weeks successively, in the state paper, and also in a newspaper printed in every county in which any of the lands in question are situated, requiring all persons having any general lien or incumbrance, on any undivided interest or share therein, by judgment or decree, to produce to the said clerk, on or before a certain day to be named in such notice, proof of all such liens and incumbrances, together with satisfactory evidence of the amount due thereon; and the clerk shall report with all convenient speed, the names of the creditors, the nature of the incumbrances, the dates thereof, and the several amounts appearing to be due thereon. *Ib.*

If it shall appear by the proceedings on such petition, or by such report that there are any existing incumbrances upon the estate or interest in the premises of any party named in the proceedings in the suit, the court shall in the order of sale, direct the commissioners to bring into court, and pay to the clerk thereof, the portion of the monies arising from the sale of the estate and interest of such party, after deducting the portion of the costs, charges and expenses to which it shall be liable. 3 R. S. 155, Appendix.

Such party may apply to the court to order such monies, or such part thereof as he shall claim, to be paid to him; which application shall be accompanied: 1. By his own affidavit, stating the true amount actually due on each incumbrance, the owner of such incumbrance, and his residence, as far as known to such party: 2. By proof, by affidavit, of the due service of a notice on each owner of any incumbrance, of the intention to make such

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application, at least fourteen days previously. If such owner reside in this state, such notice shall be served personally, or if he be absent from his residence, by leaving a copy there, with some person of proper age. If such owner reside out of this state, such notice may be served on him personally, twenty days previously, or by publishing the same in the state paper four weeks successively, once in each week. 2 R. S. 324, s. 45.

Upon such application and proof of notice being made, the court shall proceed to hear the proofs and allegations of the parties. If any question of fact shall arise, which, in the opinion of the court, cannot be satisfactorily determined without a trial by jury, the court shall award a feigned issue, to be tried as in other cases. The costs of such trial shall be paid by the party failing, which payment shall be enforced by attachment, as in other cases. 2 R. S. 325, a. 46.

When the amount of existing incumbrances shall have been ascertained, the court shall proceed to order a distribution of the moneys so brought into and remaining in court, among the several creditors having such incumbrances, according to the priority thereof respectively. 2 R. S. a. 325, 47.

The clerk or other officer of the court, by whom any such incumbrance shall be paid off, shall procure satisfaction thereof to be acknowledged, in the form required by law, and shall cause such incumbrance to be duly satisfied or cancelled of record, and shall defray the expenses thereof, out of the portion of the moneys in court, belonging to the party by whom such incumbrance was payable. 2 R. S. 325, a. 48.

The proceedings to ascertain and settle the amount of incumbrances provided by statute, shall not affect any other party in such suit for partition, nor delay the paying over or investing of moneys, to or for the benefit of any party upon whose estate in the premises, there shall not appear to be any existing incumbrances. 2 R. S. 325, a. 49.

Whenever the estate of any tenant in dower, or by the curtesy, or for life, to the whole or any part or share of the premises in question, has been admitted by the parties, or ascertained by the court, to be existing at the time of the order for such sale, and the person entitled to such estate has been made a party to the proceedings, the court shall first consider and determine, under all the circumstances of the case, whether such estate ought to be excepted from such sale, or whether the same should be sold; and in making such determination, they shall have regard to the interests of all the parties. 2 R. S. 325, a. 50.

If a sale of the premises, including such estate, shall be ordered, the estate and interest of every such tenant or person shall pass thereby; and the purchaser, his heirs and assigns, shall hold such premises free, and discharged from all claims by virtue of any such estate or interest, whether the same be to any undivided share of a joint tenant, or tenant in common, or to the whole or any part of the premises sold. Ibid. a. 51.

Upon such sale being made of any such interest or estate, the court shall direct the payment of such sum in gross, out of the proceeds thereof, to the person entitled to such estate in dower, tenancy by the curtesy, or tenancy

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for life, as shall be deemed, upon the principles of law, applicable to annuities, a reasonable satisfaction for such estate or interest, and which the person so entitled shall consent to accept in lieu thereof, by an instrument under seal, duly acknowledged or proved in the manner that deeds are required to be proved, to entitle them to be recorded. Ibid. a. 52.

In case no such consent be given at or before the coming in of the report of sale by the commissioners, then the court shall ascertain and determine what proportion of the proceeds of such sale, after deducting all expenses, will be a just and reasonable sum to be invested for the benefit of the person entitled to such estate or interest in dower, by the curtesy, or for life, and shall order the same to be brought into court, for that purpose. 2 R. S. 326, a. 53. The proportions of the proceeds of such sale, shall be ascertained and determined, in the several cases as follows: 1. If an estate in dower shall have been included in such order of sale, its proportion shall be one-third of the proceeds of the sale of the premises, or of the sale of the undivided share in such premises, upon which such claim of dower existed: 2. If an estate by the curtesy, or other estate for life, shall be included in such order of sale, its proportion shall be the whole proceeds of the sale of the premises, or of the sale of the undivided share thereof, in which such estate shall be: and in all cases, the proportion of the expenses of the proceedings shall be deducted from the proceeds of such sale. Ibid. a. 54. If the persons entitled to any such estate in dower, by the curtesy, or for life, be unknown, the court shall take order for the protection of the rights of such persons, in the same manner, as far as may be, as if they were known and had appeared. Ibid. a. 55.

The commissioners shall give notice of any sale to be made by them, for the same time and in the same manner as is required by law on sales of real estate by sheriffs on execution. 2 R. S. 326, a. 56. The terms of such sale shall be made known at the time; and if the premises consist of distinct buildings, farms or lots, they shall be sold separately. Ibid. a. 57.

Neither of the said commissioners, nor any person for the benefit of either of them, shall be interested in the purchase, nor directly nor indirectly purchase any of the premises sold, nor shall any guardian of any infant party in such suit, purchase, or be interested in the purchase of any lands being the subject of such suit, except for the benefit or in behalf of such infant; and all sales contrary to the provisions of this section shall be void. 2 R. S. 326, a. 58.

After completing such sale, the commissioners shall report the same to the court on their oath, with a description of the different parcels of land sold to each purchaser, the name of such purchaser, and the price bid by him; which report shall be filed in the court. 2 R. S. 326, a. 59.

If such sales be approved and confirmed by the court, an order shall be entered, directing the commissioners, or any two of them, to execute conveyances pursuant to such sales, which they are hereby authorised to do. 2 R. S. 327, a. 60. Such conveyances so executed, shall be recorded in the county where the premises are situated, and shall be a bar, both in law and

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equity, against all persons interested in such premises in any way, who shall have been named as parties in the said proceedings, and against all such persons and parties as were unknown, if notice shall have been given of the application for partition, by such publication as is herein before directed, and against all other persons claiming from such parties, or either of them. *Ibid.* a. 61.

Such conveyances shall also be a bar against all persons having general liens or incumbrances by judgment or decree, on any undivided share or interest in the premises sold, in all cases where the notice to such creditors, hereinbefore prescribed, shall have been given, and also against all persons having specific liens on any undivided share or interest therein, who shall have been made parties to the proceedings. But no creditor having any such specific lien shall be affected by such sale or conveyance, unless he shall have been party to the proceedings. 3 R. S. 156, Appendix.

The proceeds of every such sale, after deducting the costs, shall be divided among the parties whose rights and interests shall have been sold, in proportion to their respective rights in the premises; and the shares of such of the said parties as are of full age, shall be paid to them or their legal representatives, by the commissioners, or shall be brought into court for their use. 2 R. S. 327, a. 63.

Where any of such known parties are infants, the court may in its discretion, direct the share of such infant to be paid over to the general guardian, or to be invested in permanent securities at interest, in the name and for the benefit of such infant. *Ibid.* a. 64. And in chancery it has been held, that where lands of the wife, who is an infant, are sold under a decree in partition, the husband is not entitled to the proceeds, but the court will secure the fund for her use, until she becomes of age and consents to his receiving the same. 1 Paige, 493.

Where any of the parties whose interests have been sold, are absent from the state, without legal representatives in this state, or are not known or named in the proceedings, the court shall direct the shares of such parties to be invested in permanent securities at interest, for the benefit of such parties, until claimed by them or their legal representatives. 2 R. S. 327, a. 65.

Where the proceeds of a sale, belonging to any tenant in dower, or by the curtesy, or for life, shall be brought into court, as hereinbefore directed, the court shall direct the same to be invested in permanent securities at interest, so that such interest shall annually be paid to the parties entitled to such estates, during their lives respectively. *Ibid.* a. 66.

The court may, in its discretion, require all or any of the parties, before they shall receive any share of the moneys arising from such sale, to give security to the satisfaction of such court, to refund the said share with interest thereon, in case it shall thereafter appear that such party was not entitled thereto. 2 R. S. 328, a. 67.

Where any security is directed to be taken by a court, or any investment

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to be made, or any security shall be taken by commissioners on the sale of any real estate as hereinbefore directed, except where provision shall be made for taking the same in the name of any known owner, the bonds, mortgages, or other evidences thereof shall be taken in the name of the clerk of the court, and his successor in office, who shall hold the same by virtue of their respective offices, and shall deliver them to their successors. *Ibid.* s. 68.

Such clerks shall receive the interest or principal of any sums as they become due, and apply or re-invest the same, according to the circumstances of the case, as the court shall direct, and shall, once in every year, render to the court an account in writing, and on oath, of all monies received by them, and of the application thereof; and upon any neglect to render such account, and upon any misapplication of any monies received, the court shall suspend such clerk from exercising the duties of his office, and shall immediately report his delinquency to the governor, to the end that he may be removed by the governor and senate. *Id.* s. 69.

All investments and re-investments under the provisions of this title, shall be made in the public stocks of the United States, or of this state, or on bond and mortgage upon unincumbered real estate, of at least double the value of such investment; and no such security, bond, mortgage, or other evidence of such investment, shall be discharged, transferred or impaired, by any act of the clerk, without the order of the court, entered in the minutes thereof. *Id.* s. 70.

Any person interested in such investments or securities, may, with the leave of the court, prosecute the same in the name of the existing clerk; and no suit shall be abated by the death, removal from office, or resignation of the clerk to whom such evidences were executed, or of any of his successors. *Id.* s. 71.

When final judgment for partition shall be rendered, the court shall also adjudge each of the parties concerned therein, other than the petitioners, a proportion of the costs and charges of the proceedings, to be ascertained by the court, according to the respective rights of the parties, and the proportion of such costs assessed upon the unknown owners, to be chargeable on the part remaining undivided; and upon such judgment, execution may issue as in personal actions, and may be levied on the property of the parties respectively charged with such costs, and upon any share or part of the premises allotted on any such division, to any owner unknown or not named, and upon every portion remaining undivided, for the proportion adjudged to be paid by such owners, or chargeable to the part remaining undivided. And a sale of such premises thereupon, shall be as valid as if such unknown owner, had been named in the proceedings and in such execution. 2 R. S. 328, s. 72.

If the petitioners for any partition, shall become non-suit, or suffer a discontinuance, or a verdict shall pass against them, or judgment shall be rendered against them on demurrer, they shall pay costs, to be recovered and collected as in personal actions. *Id.* s. 73.

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The costs in this action are the full costs of the court in which the action is pending; 2 R. S. 613, s. 3; and are to be deducted from the proceeds of the sale made by the commissioners; and must be by them in the first instance paid to the petitioners, or their attorney. 2 R. S. 327, s. 62.

Any proceedings for partition commenced in the court of common pleas, or in a mayor's court, may be removed into the supreme court by writ of *certiorari*, to be allowed by any of the justices thereof, if the same be served before any juror shall be sworn to try any issue joined in such proceedings, or before judgment be given, that partition shall be made; and upon such removal, the like proceedings shall be had, as if the petition had been originally presented to the supreme court. 2 R. S. 329, s. 74.

Upon any final judgment rendered, that partition be made, or confirming partition, or for the sale of any premises, or confirming such sale, a writ of error may be brought by any of the parties to such judgment, jointly or separately, (vide 9 Cowen, 304,) and without the consent of any co-plaintiff or co-defendant, within the same time and under the like restrictions, as in cases of personal actions, of which we will speak hereafter. 2 R. S. 329, s. 75. And it shall not be necessary for a plaintiff or defendant bringing such writ, to summon and sever any co-plaintiff or co-defendant. *Id.* s. 76.

Error may be assigned upon such writ, for any erroneous adjudication upon the rights of any of the respective defendants or respective plaintiffs, and the court shall direct the person whose interest is affected by such adjudication, to plead to such assignment of errors, and to appear in such cause as a defendant in error. 2 R. S. 329, s. 77.

The court may give judgment either for affirmance or reversal, in part or in whole, with costs to be paid by either of the parties, or by any one or more defendant or plaintiff, to his co-defendant or co-plaintiff. *Id.* s. 78.

JACKSON, *ex dem.* WAGGONER AND OTHERS *against*
MURPHY.

Where the plaintiff and defendant claim under adjoining patents, the court cannot grant a rule ordering the lessors of the plaintiff to permit a survey to be taken of the boundary line, but if it appear necessary for the defense in the suit that it should be ascertained, they will allow a rule to stay proceedings till the lessors consent to a survey, or the judge at the circuit may postpone the cause on the same principle.

EMOTT moved for a rule, ordering the lessors of the plaintiff to permit a survey to be taken by the defendant of the boundaries and marked trees of a patent under which he

Low v. Hallett.

claimed, on an affidavit stating that it was necessary for his defence to ascertain the lines of it, but that a person sent by him for that purpose had been prevented by the agent of the lessors who derived title under an adjoining grant.

KENT, Ch. J. Were we to grant this application, could we enforce the leave we had given? Suppose an action of trespass brought, would this be a justification? But it does not appear to me that our interference is necessary. The judge at the circuit would, upon the grounds now shown to the court, postpone the cause. You may, however, take your rule to stay proceedings, till the lessors of the plaintiff enter into a consent rule for having a survey made

Rule denied.

Low against HALLETT.

In opposing a motion for a reference, it is sufficient if the affidavit state that the controversy will involve questions of law, as the party "is advised by his counsel, and verily believes," without setting forth what those questions are.

EMOTT, on the common affidavit that the trial of this cause would require the examination of long accounts, moved for a reference.

Hoffman, contra, read an affidavit by the plaintiff, simply stating that as he was advised by his counsel, and verily believed, the controversy would necessarily involve questions at law.

Emott, in reply, submitted to the court, whether the affidavit ought not to have specified what those questions of law were.

 Moore v. Bacon.

THOMPSON, J. I believe the usual mode has been to state them.

Per Curiam. The addition of "as advised by counsel" is sufficient. It is to be presumed that counsel would not advise, unless *there was some founda- [*88] tion.(a) Take nothing by your motion, and pay the costs of resisting.[1]

Motion refused.

 MOORE against BACON.

A clerical misprision in a return to a *certiorari*, may be amended after joinder in error, when it appears to have been served to prevent the entry of a default, for want of being served with an order to stay proceedings, then applied for, and expected, but it will be allowed only on paying costs of the assignment, and resisting the application to amend.

MOTION to amend a justice's return by altering the date of an act, mentioned to have been passed on the 7th day of April, 1804, to the 7th day of April, 1801.

P. W. Radcliff read an affidavit by the attorney of the defendant in error, that the mistake was a clerical misprision, which he did not discover till the 27th of March last, when a copy of the assignment of errors, in which this was set forth as a cause, was served on him, with a notice to join in error in twenty days, or that a default would be entered.

(a) See *Lusher v. Walton*, 1 Caines' Rep. 151 n. (b.)

[1] To warrant denying a reference on the ground that questions of law will arise, the court must be satisfied that they will be questions of real difficulty. *Anon.* 5 Cow. 423; *Shaw v. Ayres*, 4 Cow. 52. The party opposing a motion to refer, must state what the points of law are, to enable the court to judge of the propriety of granting or referring the application. *Luther v. Walton* 1 Cai. R. 149; *Salisbury v. Scott*, 6 J. R. 329.

Bach v. Coles.

Caines, contra, urged that the application could not now be heard, as, from an affidavit of the attorney for the plaintiff, it appeared to be after joinder in error on this very point so late as the 22d of April, and that, in such cases, the rule was, not to allow of amendments.

P. W. Radcliff, in reply. The papers before the court show that the parties live in a remote county, and the joinder was merely to prevent the entry of a default for want of being served with an order to stay proceedings.

Per Curiam. The observation of the defendant's counsel takes this case out of the general rule. The order to stay proceedings was applied for, and evinces, that the joinder was a mere matter of precaution, not on a reliance on, or affirmation of the correctness of the proceedings. The amendment, therefore, must be allowed, on payment of the costs of the assignment of errors, and those of resisting this application.[1]

Motion granted.

BACH and BACH against COLES.

The court will not hear an application for an order to stay proceedings on a case made, unless recourse has previously, and without success, been had to a judge.

THIS was an application to the court, in the first instance, for an order to stay proceedings on a case made.

[1] After an assignment of errors, it is too late for the plaintiff to move to amend the return. He ought to have applied to a judge for an enlargement of the rule. *Rue v. Sprague*, 1 J. R. 493. The plaintiff cannot move for the justice to amend his return after he has noticed the cause for argument. *Knapp v. Onderdonk*, 2 Cal. R. 383.

As to amendments of returns, vide *Wightman v. Clapp*, 2 Cow. 517; *Palmer v. Peck*, 2 Cow. 461; *Jackson v. Crane*, 1 Cow. 38; *Day v. Wilber*, 2 Cal. R. 134.

Hartshorn v. Gelston.

Per Curiam. Though the rule authorizing parties to apply to a judge for this purpose does not abrogate the power of the court, yet we ought never to be resorted to till the other mode has been attempted. This is chamber business.

Motion denied.

*HARTSHORN and others *against* GELSTON. [*84]

That the government of the United States is interested in a cause, does not make it of importance enough to grant a struck jury.

PENDLETON moved for a struck jury in this suit, which was for erecting a beacon on the plaintiff's lands at Sandy-Hook, after being warned not to do so, on an affidavit, stating a former action and recovery for the same offence, the pendency of two suits for a continuance of the original trespass, and that the defendant was, as he verily believed, reimbursed by the government of the United States for the damages paid in the first action, and would be indemnified by them against any recovered in the present or other suits. These circumstances, and the probability that the general government was interested in the cause, were sufficient, he contended, to make it of such importance as to require a struck jury.

Per Curiam, stopping *Sanford*. There is nothing in this case which is not fitted to the capacity of an ordinary jury. The parties litigant do not make a case important.(a)[1]

Struck jury refused.

(a) See *Spencer v. Sampson*, 1 Caines' Rep. 498, note (a).

[1] In the recent case of *Poucher v. Livingston*, 2 Wendell, 296, where the defence to a note was, that it was a forgery, and where the controversy had excited much speculation and interest, and the connections of the parties were numerous and respectable, this court refused the motion; and Suther-

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land, J., observed: "The statute authorizes the court to grant a struck jury only in cases of intricacy and importance. The testing the genuineness of a signature to a note, is not a question of intricacy, demanding more than ordinary intelligence, although it may be difficult to come to a satisfactory conclusion. Nor is this a case of importance, within the meaning of the statute. It may highly interest the parties and their friends, but the public have no particular interest in the matter. Where public officers have been libelled, for acts done in their official capacity, suits brought by them in vindication of their characters have been deemed important, and struck juries allowed; but where causes are important only to the parties, such consideration is not sufficient to induce the court to grant a struck jury. The probable amount of recovery does not entitle these causes to be considered important, and the interest excited in the county of Columbia, cannot, from the nature of the controversy, be such as to endanger a fair and impartial trial." So, also, a foreign jury will be granted only in extreme cases. 10 Wendell, 570. So, also, where the case turns solely on a question of law, and there is no fact in dispute, a special jury will be refused. 2 Carr. & Payne, 483. .

 BALL against RYERS.

If the sheriff have a surplus in his hands, arising from a sale on an execution, the court will order it to be paid over on a *fi. fa.* issued at the suit of another plaintiff.

THE plaintiff in this suit had issued a *fi. fa.* upon a judgment he had recovered.

Riker, citing Doug. 234, (a) now moved for a rule directing the sheriff to pay over, on the execution thus sued out,

(a) *Armistead v. Philpot*. But if a plaintiff have, in the hands of the sheriff, money arising from an execution, a levy cannot be made on such money by virtue of a *fi. fa.* against the plaintiff; for the mere raising the money by execution, does not, it is said, pass the property in it to the creditor. *Turner v. Fendall*, 1 Cranch, 117. In the principal case, Livingston, J., said he had no doubt money might be levied on. See Dalton's Sheriff, Accord. But in *Evans v. Cramlington*, 1 Show. 5; 2 Show. 509, it is said that money cannot be taken on an extent at the suit of the king; and see, also, *Fieldhouse v. Croft*, 4 East, 510, overruling *Armistead v. Philpot*; and determining that the surplus of a former execution in the hands of a sheriff

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the sum of 197 dollars and 26 cents, being the surplus arising from a leasehold property, levied on, and sold in an action against the same defendant; at the suit of another plaintiff.[1]

Ordered accordingly.

KEELER against ADAMS.

The court will not order a justice to make a return contrary to what he has sworn to, though there appear a certificate from him impeaching the return, but will leave the party to his action. If a special notice amounts to the general issue, it seems unnecessary to return it. In a special action on the case for damages, a notice of set-off cannot be given. The court will not *ut sem.* order a justice to return a special notice which, if on the record, would not vary their judgment.

HOPKINS moved for a rule on a justice, ordering him to amend his return by inserting the substance of a notice given at the trial of the cause, and the testimony adduced under it.

The affidavits of the defendant and his attorney set forth that the action was trespass on the case for not returning and misusing *four beds, bedsteads and some [*85] furniture, let to the defendant for six months, to which not guilty was pleaded, with notice that at the trial evidence would be given that the hiring was for twelve

shall not be liable to a new execution against the defendant; and *Knight v. Criddle*, 9 East, 48, that money levied by a plaintiff is not, while in the sheriff's hands, liable to an execution against him. See, also, *Williams v. Rogers*, 5 Johns. Rep. 167, where the court seem inclined to adopt the cases of B. R., though "they do not say they will never interfere."

[1] Bank bills or money, and everything belonging to the debtor of a tangible nature, except mere choses in action and articles expressly exempt by statute, may be taken and sold under an execution. *Handy v. Dobbin*, 12 J. R. 220; *Holmes v. Nuncaster*, 12 J. R. 395; *Bogert v. Perry*, in error, 17 J. R. 351.

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months, at the rate of 4 dollars per bed per annum, and that the defendant had paid more to the plaintiff than the rent for six months amounted to, and also, that the plaintiff had, before the expiration of the year, by force, taken away the goods demised, and that the defendant would, on the hearing, insist on recovering the balance due him on the overplus of the rent paid. That proof was made of these circumstances, and the jury found a verdict in his favor for three dollars damages and six cents costs, upon which the plaintiff sued out a *certiorari*, and had assigned for error that the jury gave damages for the defendant, when he claimed none by his plea.

To these depositions was annexed a certificate from the justice himself, corroborating their contents.

Emott, contra, read affidavits made by the plaintiff, his attorney, and the justice, denying the notice of set-off, but admitting one, of giving in evidence that the hiring was for six, not twelve months. In that by the justice, the contradiction between his certificate and affidavit was explained to arise from surprise in the hurry of business; and conceiving the former, which was brought to him ready prepared, to relate to the argument used by the defendant, on the trial.

From these facts, and the tenor of the defendant's affidavits, he insisted, that as the suit below was an action on the case for damages, there could be no set-off, and that the court would not order a return, contrary to the deposition of the justice, as that would be obliging him to lay himself open to an action.

TOMPKINS, J., delivered the opinion of the court. We are of opinion that the present motion ought not to be granted. The evidence of the notice of set-off, which the defendant alleges to have been given, consists of his own affidavit, that of his counsel, and a certificate of the justice. To this is opposed the affidavits of the plaintiff and his

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counsel, and an affidavit of the justice, stating the notice of special matter given at the trial of the cause to be different from the one specified in the affidavits on the part of the defendant.

The latter notice was of such matters as it was competent for the defendant to give in evidence under the general issue, and, therefore, a return of it by the justice, in addition to the general *issue, would be unnecessary, and immaterial in the final determination of the cause. [*86]

The weight of evidence before us is against the allegations of the defendant, since the affidavit of the justice ought to receive greater credit than his certificate; especially as in the former he explains the circumstances under which the latter was obtained, and his inadvertence and misapprehension at the time of giving the latter. We cannot suppose that the justice, if compelled to amend, would return any other notice than the one to which he has now sworn, and, as is remarked before, the notice amounted to no more than the general issue.

We should not be inclined to grant the defendant's motion, if the affidavits on his part were uncontradicted by opposite proof. The declaration below was for a *tort*, to which the defendant properly pleaded not guilty, and, in such an action, evidence of set-off is inadmissible.^(a) It cannot, therefore, be important for the defendant to have a return of the notice which he alleges to have been given, as it would not vary the determination of the cause in this court. Let the defendant take nothing by his motion.[1]

KENT, Ch. J., gave no opinion on the point of set-off.
Motion denied.

(a) A loss arising from mismanagement in taking bad securities for money, is not an object of set-off. *Winchester v. Hackley*, 2 Cranch, 344. See *Brown v. Cuming*, 2 Gaines' Rep. 33, note (a.)

[1] A motion to amend a justice's return to a certiorari made by the defendant in error, will not be granted, if it appear by opposing affidavits that the

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amendment sought will be incorrect in point of fact, or that, notwithstanding the amendment, the judgment must be reversed. *Wrightman v. Clapp*, 2 Cow. 517.

This motion to the common pleas to amend, is, either by the party, where the return is imperfect, in order to compel the justice to supply the defect; (3 John. 439; 2 Caines, 384; 1 id. 501;) or else, it may be made in behalf of the justice, where he has committed a mistake from the management or imposition of the party or his attorney, or, indeed, where the mistake happens from any other cause. 2 Caines, 139; 5 John. 350. In the latter case, the return may thus be corrected, either in behalf of the justice, or of the party with his consent, upon an affidavit, which should always state the precise point in which the amendment is sought, in order to enable the court to judge of its materiality. 3 Caines, 136. The rule should also contain the particulars, in which such amendment is to be made, in order to instruct the justice where to amend in his own behalf, or to compel an amendment in behalf of the party. And, unless this is the case, it is presumed that the rule would be a nullity. In the first case, the justice should procure an office copy of the rule for his own sake; in the latter, it must be served on him by the party, before he can be compelled to amend. Where the return is imperfect, the justice may, by arrangement between the parties, gratuitously make a supplementary return, supplying the defect; but where a motion is made to amend, the usual notice of the motion, &c., must be given to the opposite party. 2 Caines, 258; 5 John. 350. Where a justice made a supplementary return, and then another return contradicting it, the court refused to receive either, and proceeded upon the first. 7 John. 548. And where he had given a certificate of proceedings in the cause, and afterwards contradicted them by affidavit, the court refused an order to amend, according to the certificate. 3 Caines, 84. And in all cases, where the first return is precise, specific and full, a further return cannot be obtained by the party on making an affidavit supplementary to the one on which the certiorari was founded. 2 John. 182.

These amendments may be ordered at different stages of the suit, according to the circumstances of the case, and the person applying. In one case, a justice was allowed to amend a clerical mistake, on payment of costs, even after the cause had been argued, and the opinion of the supreme court had been delivered, reversing the judgment. 2 Caines, 134. In another case, he was allowed to amend, after the cause had been noticed for argument, upon an affidavit that he was led into the mistake by the management and imposition of the plaintiff's attorney. 5 John. 350. And the defendant will be allowed, under special circumstances, to move for the amendment of a clerical mistake, even after a joinder in error. 3 Caines, 83. But the plaintiff cannot, in general, move to amend after an assignment of errors, and especially, after noticing the cause for argument. 2 Caines, 388; 1 John, 493. But the manner, time, &c., in which a party must apply to the court to have the justice's return amended, and the practice and proceedings thereon, are now generally regulated by the rules of the different courts of

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common pleas, it being provided by statute, that they shall have the power to compel the justice to make or amend his return, by rule, attachment or mandamus, as the case may require. 2 R. S. 185, s. 179. And no assignment of errors or joinder in error is now necessary, (Ibid. s. 186,) except where error of fact is assigned.

It is not necessary, on service of the rule to amend, to make out a new return complete. It may be done with less trouble, and with equal effect by a supplemental return.

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In a civil suit, a *certiorari* to an inferior court removes, in judgment of law, the record itself with the proceedings in the same stage as they were below, therefore, they need not be commenced *de novo*, but must go on from the last pleading, as if in the court below. If a notice of trial for the sittings, be for the right day of the month, it is good, though the day of the week mentioned be wrong.

ON *certiorari* to the mayor's court after issue joined, the plaintiff, without declaring *de novo* here, served a notice of trial for Tuesday, the 18th of April, and took an inquest at the last New York sittings.

Woods, on affidavits showing these circumstances, moved to set aside the inquest, contending that the proceedings should have commenced anew, and a declaration in this court have been regularly served. He also took an exception to the return of the writ, in certifying that a copy only was sent up, and insisted the original bill, &c., ought to have been removed. In addition to this, he urged that the notice of trial being for Tuesday, instead of Monday the 18th, was insufficient, and, therefore, on this ground, as well as the others, the application ought to be granted.

Bertson and Boyd, contra. The practice under a *certiorari* is to be distinguished from that on a *habeas corpus cum causa*. By the former, the proceedings themselves are

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brought up; by the latter, only a transcript is returned.

In the first case, therefore, as the original pleadings [*87] in the cause are actually before the court above, *the case is taken up as they then appear, and the suit goes on, from the last step below, without any renovation. This reasoning does not apply to a *habeas corpus*. The return to that is not of the record itself, but of its tenor; of necessity, then, a new declaration must be filed here, for the purpose of creating a record on which the superior jurisdiction may act. It is no argument against this reasoning to say that the record is not in fact removed by a *certiorari*, and that, in the present instance, the very return specifies only a copy is sent up; for, in no case are the proceedings really moved from the court below. On writs of error from the king's bench to the common pleas, the record is not actually transmitted, yet, by the fiction of law, it is so considered; and it is on this intendment, made from the nature of the writ, that the practice is founded. That the notice was for Tuesday, instead of Monday the 18th, is immaterial. It was impossible the defendant could have been misled. (See exactly the same point in *Botten v. Harison*, 8 Bos. & Pull. 1.)

Per Curiam. The last objection is a captious attempt to take advantage. The period at which the sittings were held was a matter of general notoriety. The day of the month was right, and though that of the week was wrong, it could not, as the plaintiff's counsel have remarked, mislead, and must therefore be rejected as surplusage, for it was not necessary to state it. With regard to the regularity of the practice adopted, it is settled, that upon a *certiorari* in a civil suit, we must proceed as the court below would have done, and consider the cause in the same state here as it was there. On the return of the writ, therefore, the cause was at issue, and nothing more required than to notice for trial. On a *habeas corpus*, the history of the cause is sent up; on a *certiorari*, the record itself. We

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cannot attend to the statement of the return, that it is only a copy which has been transmitted. In the eye of the law this is the record; and its being called a copy in the return, cannot make us consider it otherwise. In the analogous case of a writ of error, urged on the argument, the transcript only is before the court of king's bench. But it is always regarded as the record itself. *Rex v. North*, 2 Salk. 565. The same principle governs the present case. Nothing is shown to take it out of the general rule. If there are merits, they ought to have appeared on affidavit. This not being done, we must hold to strict practice.[1]

Motion denied.

[1] A certiorari removes, in contemplation of law, the record itself; and where, in the C. P., the plaintiff had filed a declaration; held that he might proceed against the defendant in the S. C., on the removal of the cause by certiorari, by immediately taking a rule against him to plead, and for want of a plea to take a default. *Blake v. Hall*, 5 Cow. 37; *Ex parte Vermilyea*, 6 Cow. 555.

The office of a writ of certiorari considered. *Stone v. The Mayor, &c., of New York*, 25 Wen. 157.

The proceedings of a municipal corporation in the improvement of the streets of a city, will not be reversed when they act within the scope of the authority conferred upon them by statute, and comply with its forms. *Ex parte The Mayor, &c. of Albany*, 23 Wen. 277.

They are not obliged, in such matters, to adhere to a by-law passed by themselves, when it so cripples their powers as to disable them from performing those duties enjoined or authorized by the law of the state. *Id.*

A certiorari should name the party aggrieved, and set forth the cause of complaint. *Id.*

The allowance of a certiorari, in such cases, rests in the discretion of the court, even where there is error. *Id.*

The office of a common law certiorari. *Id.*

A certiorari to remove the proceedings of the common council of New York, relative to streets, will not be granted after great delay and heavy expenditures incurred. *Elmendorf v. The Mayor, &c., of New York*, 25 Wen. 693.

It seems the court would refuse a certiorari after the lapse of two years, in analogy to the limitation of a writ of error. *Id.*

A common law certiorari will not, in general, be granted, where a right of appeal exists, unless it appears that there has been a usurpation of power, by which the party has been injured. *Wood v. Randall*, 5 Hill, 264.

A certiorari at common law lies only to inferior courts, and officers exercis-

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ing judicial powers. *The People v. The Mayor, &c., of New York*, 2 Hill, 9. See *Leroy v. The Mayor, &c., of New York*, 20 J. R. 430.

By virtue of its common law jurisdiction, certiorari may be issued from the supreme court to review a judgment rendered by a justice, in such cases as those in which the statute authorizes the issue of the writ from the common pleas. *Kellog v. Church*, 3 Denio, 228.

It seems, that a certiorari will, in no case, be sustained for the purpose of reviewing official proceedings of either a legislative, executive, or ministerial character; e. g. the ordinances and proceedings of corporations, as such, whether public or private. *Id. Bogert v. The Mayor of New York*, 7 Cow. 158.

Otherwise, if the acts of officers of municipal corporations are plainly judicial. *In the Matter of Mount Morris Square, in the city of New York*, 2 Hill, 14.

The allowance of a common law certiorari rests in the sound discretion of the court; and, it seems, where it will operate a public inconvenience, or the case is a questionable one for relief in this way, the party should be left to his remedy by action. *The People v. The Mayor of New York*, 2 Hill, 9. *In the Matter of Mount Morris Square, &c.*, 2 Hill, 14.

It will not lie to review the proceedings of any person, officer, or body, acting under a naked power, though conferred by law, to take private property for public use. *In the Matter of Mount Morris Square, in the city of New York*, 2 Hill, 14.

Where the acts of corporation officers are the proper subjects of review by certiorari, the writ should be directed to them, and not to the corporation. *Id.*

Where the superintendents of the poor refuse to audit an account for services in and about the support of county paupers, the remedy is by certiorari. *Vedder v. Superintendents of Schenectady*, 5 Denio, 564.

It seems, a tax assessment, or an assessment of damages for property taken for public use, is a proceeding sufficiently judicial in its nature to constitute the subject of review by certiorari, provided no other objection exists. *Id.* See *Baldwin v. Calkins*, 10 Wen. 168.

A certiorari, however, will not be allowed where another direct remedy is given. *Id. The People v. The Supervisors of Queens Co.*, 1 Hill, 195. *Woodward v. Covert*, 1 Hill, 674.

The right of opposing a motion for confirming the report of the New York commissioners of estimate and assessment is in the nature of a remedy by appeal, and therefore a certiorari will not be allowed to review their proceedings. *Id.*

It will not lie, it seems, to any inferior tribunal except to remove proceedings which still remain before it. *Id. The People v. The Supervisors of Queens Co.*, 1 Hill, 195.

A certiorari will not lie to remove and correct the proceedings of a board of supervisors in assessing town and county taxes. *Id.*

A common law certiorari may be sued out to remove an assessment, but

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its allowance is discretionary, and is often refused on considerations of public policy. *Weaver v. Devendorf*, 3 Denio, 117.

A certiorari will not lie to remove the proceedings of persons acting as commissioners in the laying out of a highway, though it be shown that they omitted to take the oath of office within the time limited by law. *The People ex rel. Woodward v. Covert*, 1 Hill, 674.

The question whether persons acting as commissioners of highways, are such either *de facto* or *de jure*, cannot be reached by certiorari. *Id.*

A certiorari lies from this court to the assistant justices of the city of New York, to remove proceedings had before them under the statute relative to summary proceedings to recover the possession of land. *Boach v. Cosine*, 3 Wen. 227.

On presenting a petition for the removal of a cause into the circuit court of the United States, a bond in the sum of \$1000 is good security within the meaning of the act, though the sum demanded be \$14,000, when the defendant has not been holden to bail in this court. *Blanchard v. Dwight*, 12 Wen. 192.

Where a certiorari is sued out to remove a justice's judgment into the common pleas, and the instrument intended as a bond, in compliance with the statute, is without seals, the common pleas, on an offer to amend by affixing seals, should permit the amendment to be made. *The People ex rel. Reynolds v. Rensselaer*, 11 Wen. 174.

One of two defendants cannot alone sue out a certiorari, and the writ be quashed, unless the party prosecuting it shows that his co-defendant is incapable of consenting to join, or is absent from the state, or takes measures to compel him to join, by a rule requiring him to appear and join, or be precluded from bringing error. *Id.*

In street cases, it is a matter of course to grant a certiorari, after confirmation of the report of commissioners of estimates and assessments, where the object of the party is to remove the proceedings into the court for the correction of errors. *In the Matter of Carlton street*, 20 Wen. 686.

The refusal of a subordinate tribunal to grant a new trial, or to postpone the trial of a cause, is no ground for a writ of error; but when palpable injustice has been done by such tribunal in the exercise of its discretionary power, in opposition to settled principles of law and equity, their decision may be corrected by certiorari or mandamus, as in this case where a hearing was improperly refused to be postponed. *Brooklyn v. Patchen*, 8 Wen. 47.

A certiorari to remove a judgment of a justice of the peace may issue from the court of common pleas, in which it is made returnable. *The People v. Oapndaga C. P.*, 4 Wen. 212.

Where a writ of certiorari recited that B. impleaded S. before the justice, and by mistake recited that judgment was given against B., whereas it should have been for B., and then commanded the justice to certify the said proceedings and judgment, with the process, pleadings and other things touching the same, &c., and the judgment was correctly stated in the affidavit on which the certiorari was allowed; held, that this was not such a mis-

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description as warranted the justice in returning that there was no such cause before him as was stated in the writ. *Bird v. Silobie*, 1 Cow. 532.

But the court said the plaintiff might amend if he chose. *Id.*

A certiorari does not lie to a justice of the peace before whom summary proceedings are had to inquire into an encroachment upon a public highway or landing place, under the "act regulating highways and bridges in the counties of Suffolk, Queens and Kings;" and where such writ has issued, upon the coming in of the returns it will be quashed. *Pearsall v. Commissioners, &c., of North Hempstead*, 17 Wen. 15.

It seems that the acts of a justice, in such a proceeding, cannot be reviewed on certiorari: but that, when a suit is brought to collect the penalty, and the certificate of the jury is produced in evidence, it may be objected, that the proceedings before the justice were not conformable to the statute. *Id.*

On certiorari removing a cause from a justice's to the common pleas, an objection not taken in the court below cannot be urged in reversal of the judgment, especially where, on the trial in the court below, a course of defence is adopted, calculated to mislead the justice, and to induce him to suppose that there is no other question for consideration than that raised before him. *Potter v. Deyo*, 19 Wen. 361.

On a common law certiorari, the court will not review the facts upon which is founded the decision of the judges of the common pleas, upon an appeal to them from an order of commissioners of highways in the laying out of a road. *Allyn v. Commissioners of Highways of Schodack*, 19 Wen. 342.

A certiorari to remove justice's judgment will not be quashed, although not served within ten days after its allowance, provided it be served within thirty days after the rendition of the judgment. *The People v. Green*, 18 Wen. 511.

Certiorari to remove a cause in which an issue of fact has been joined from the common pleas, must be filed (2 R. S. 389,) at least eight days before the first day of term, at which it would be regular that such issue might be tried according to the practice of the court. *McKinney v. Stoddard*, 1 Denio, 270.

A certiorari to remove a cause from the common pleas, cannot be issued after one trial had in that court. *Day v. Gallup*, 18 Wen. 513.

In a suit against the maker and indorser of a note, one defendant may sue out a certiorari without summons and severance. *The People v. Oswego C. P.*, 18 Wen. 515.

A certiorari to the supervisors of a county to remove the assessments for county charges, will not be sustained: so held in this case, in which, even after a return to the writ, the certiorari was quashed. *The People v. The Supervisors of the County of Alleghany*, 15 Wen. 198.

The writ of a certiorari, when used for the purpose of reviewing the acts and decisions of special jurisdictions, created by statute, and which do not proceed according to the course of the common law, such as boards of su-

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pervisors, commissioners of highways, and the like, does not issue *ex debito justitiae*, but only upon application to the court, and special cause shown. *Id.*

A *scire facias* sued out in a court of common pleas, to obtain execution upon a judgment rendered in that court, and remaining there, cannot be removed by certiorari into the supreme court. *The People v. Corey*, 19 Wen. 633.

A certiorari to remove a cause from a court of common pleas into this court must be filed eight days before the first term at which the issue joined in the same might be tried if the cause was not removed. *George v. Orcutt*, 19 Wen. 647.

On a motion for a certiorari in open court, the party against whom the proceeding is had, is not allowed to controvert the allegations of the party applying; he is at liberty only to present such questions of law as in this stage of the proceeding properly arise. *Commissioners of Highways of Warwick v. The Judges, &c. of Orange*, 9 Wen. 334.

Criminal cases tried at the sessions, or oyer and terminer, will not, for the future, be heard upon a case made for the advice of this court, unless brought up by certiorari. Rule of court. 15 Wen. 163.

A party having no interest in the subject matter of proceedings had under the statute authorizing summary proceedings in certain cases, is not entitled to sue out a certiorari. *Colden v. Bots*, 12 Wen. 234.

An error committed in the assessment of the expense of regulating and paving streets in cities and villages, under particular statutes in the quantum of the assessment upon particular lots, and not in the principle upon which the assessment is made, cannot be corrected by certiorari. *Bouten v. Brooklyn*, 2 Wen. 395; *Ex parte Mayor, &c. of Albany*, 23 Wen. 277.

A party who appeals from an assessment, and is heard on such appeal, cannot afterward object to the sufficiency of the notice of assessment. *Bouten v. Brooklyn*, 2 Wen. 395.

After a review of an assessment, a new notice for parties interested to appear and object is not necessary. *Id.*

Before suing out a certiorari to remove a cause from the common pleas into this court, the defendant must cause his appearance to be entered: simply giving notice of a retainer is not enough. *Ex parte Isaacs*, 12 Wen. 193.

A cause may be removed from a court of common pleas to the supreme court, in every case, by a writ of certiorari, as well as by a writ of *habeas corpus cum causa*, &c. *Jackson ex dem. Kip v. Corley*, 14 J. R. 323.

And a certiorari is exclusively the proper writ for that purpose, where the defendant is not in custody, or has not filed common or special bail, nor indorsed his appearance on the writ. *Id.*

A certiorari removing proceedings in street cases, will not be granted *ex parte*; notice must be given to the attorney of the corporation. *Ex parte Albany Water Works Co. v. The Albany Mayor's Court*, 12 Wen. 292.

To remove a justice's judgment by certiorari, a writ of certiorari must be presented, for allowance, as well as affidavit setting forth the testimony, &c.,

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within 30 days after rendition of the judgment. *The People v. Albany C. P.*, 12 Wen. 263.

It seems that the affidavit, and the allowance and service of the certiorari on the justice, should all be accomplished within 30 days after judgment. *Id.*

Where served within ten days after allowance, but the allocatur was not indorsed until 53 days after the judgment, proceeding held irregular. *Id.*

A supplemental affidavit, made after the time limited by statute, ought not to be received, except to establish some collateral matter; if it affects the merits of the case, it should be rejected. *Id.*

A common law certiorari can issue only when allowed in open court, except when issued *ex debito justitiæ*. *Bradner v. Superintendent of poor of county of Orange*, 9 Wen. 433.

Where it appears, from a bill of particulars, that the damages claimed in a suit in the common pleas are less than \$250, a certiorari cannot issue to remove the cause into this court. *Whittlesey v. Zane*, 9 Wen. 432.

A certiorari to remove a justice's judgment into the common pleas, must be allowed by an officer residing within the county where the judgment was rendered. *The People v. Seneca C. P.*, 6 Wen. 517.

Where a certiorari is allowed by a proper officer, although his allocatur be not indorsed upon the writ, and the justice make return, the C P. have jurisdiction of the cause. *The People v. Onondaga C. P.*, 7 Wen. 516.

But, notwithstanding the provisions of the revised statutes authorizing the removal of a justice's judgment, by certiorari, into the common pleas, such judgment may be removed into the supreme court by the same writ. *Comstock v. Porter*, 5 Wen. 98; *Wood v. Randall*, 5 Hill, 264.

But the right to the writ to remove such judgment into the supreme court, by certiorari, not being *ex debito justitiæ*, it cannot issue without leave obtained from the court on special application founded on affidavit. *Id.*

A certiorari to remove a judgment rendered by a justice of the peace, may issue from the court of common pleas, in which it is made returnable. *Storv v. Onondaga C. P.*, 4 Wen. 212.

It will not lie to remove proceedings on a complaint for a forcible entry and detainer until after inquisition found. *Haines v. Backus*, 4 Wen. 213.

It will not lie to a justice of the peace to bring up the proceedings had under the revised statutes concerning encroachments on highways. *Pugoley v. Anderson*, 3 Wen. 468.

In a proceeding of that kind, the justice cannot pass upon the qualifications of the persons returned as jurors. *Id.*

A certiorari at common law, allowed by a commissioner, will not be quashed, if, previous to the motion to quash, the propriety of the issuing of the writ has been submitted to, and passed upon by the court; the mere fact of an order for a supplementary return will not cure the error of the allowance by a commissioner. *Caledonian Company v. Trustees of Hoosick Falls*, 7 Wen. 598, and correction of case, 668.

If a common law certiorari has been awarded in an improper case, the

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court will quash it, even after a return and hearing on the merits. *The People v. The Mayor, &c., of New York*, 2 Hill, 9.

The supreme court has the power at common law to review the proceedings of all inferior tribunals, to pass upon the jurisdiction of such tribunals, and to review all legal decisions made by them; but not their determinations upon questions of fact, which are conclusive unless a power of review is given by statute. *Starr v. The Trustees of Rochester*, 6 Wen. 564.

So to a certiorari issued by this court, an inferior tribunal is bound to return so much of the facts of a case as will enable this court to determine whether such tribunal had jurisdiction of the subject matter adjudicated upon. *Id.*

Although a party has his remedy by action, where a tribunal acts without jurisdiction, he may, notwithstanding, seek a reversal of the proceedings by certiorari. *Id.*

In a proceeding relative to the laying out of streets, wherein the president of a village, trustees, commissioners, and assessors are actors, certiorari lies; and it may be directed to each of these officers; but it seems, a certiorari should be directed to them separately. *Id.*

A certiorari to bring up the proceedings of an inferior tribunal into this court, must be allowed by the court, and cannot be allowed by a commissioner. *Id.*

It will not lie to the trustees of a school district to review the proceedings of the trustees, or of a district meeting. *Storm v. Odell*, 2 Wen. 287.

On error in a criminal cause, a certiorari to return diminution need not be allowed by a judge. *Lambert v. The People*, 7 Cow. 103.

Where the canal appraisers appraised the damages of an individual, without giving him an opportunity to be heard or to produce testimony, the court allowed a certiorari. *Fonda v. Canal Appraisers*, 1 Wen. 288.

It will be awarded to remove proceedings from before a commissioner in cases of insolvency, when they are irregular. *Anon.*, 1 Wen. 90.

A non-suit before a justice after hearing, cannot be reviewed by certiorari, but only by appeal. *Gleason v. Clark*, 9 Cow. 57.

Where a court proceeds erroneously, the remedy is by certiorari or writ of error; but where there is no jurisdiction, all is absolutely void, and all concerned in enforcing the judgment are trespassers. *Colvin v. Luther*, 9 Cow. 61.

The present want of a paper below will not prevent a certiorari from being awarded by the court of errors. *Law v. Jackson*, 8 Cow. 746.

It is enough that they see that the court below may authorize the paper sought by the certiorari. *Id.*

A certiorari does not lie to remove a feigned issue awarded by a court of common pleas into the supreme court. *Ebemer v. Williams*, 7 Cow. 494.

A trial as to any of the defendants requires an appeal from all. The cause cannot be divided, and part of the defendants cannot bring certiorari. *Moody v. Gleason*, 7 Cow. 482.

A challenge of a juror for principal cause, even if it be not entered on re-

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cord by the clerk, will be reviewed on certiorari. *The People v. Vermilyea*, 7 Cow. 108.

Evidence given in an inferior criminal court cannot be reviewed by writ of error or certiorari. *Id.*

The district attorney may remove a criminal cause to the supreme court by certiorari, as a matter of course and of right. *Id.*

In criminal cases, doubts upon the admission or legal effect of testimony cannot be brought before a superior court by certiorari or writ of error. *Ex parte Vermilyea*, 6 Cow. 555.

But a challenge for principal cause forms part of the record, and to review this, a certiorari will lie in criminal cases, and a writ of error in a civil cause. *Id.*

Otherwise, if a challenge to the favor. *Id.*

Where, in a suit under the act for the more speedy recovery of debts, to the value of \$50, (sess. 49, c. 238,) the defendant omits to plead, and judgment is rendered, a certiorari lies. *Harwood v. French*, 4 Cow. 501.

A party cannot bring a certiorari upon the formal error of refusing to adjourn, and also have his appeal on the merits. *Bakwin v. Goodyear*, 4 Cow. 536.

It is only where there is no issue that a certiorari will lie. *Id.*

The court may award a writ of certiorari to support the judgment at any time. *Rowan v. Lytle*, 4 Cow. 91.

The decision of a board of canvassers of an election cannot be reviewed by certiorari. *The People v. Van Slyck*, 4 Cow. 297.

A certiorari will not lie to remove into the supreme court proceedings commenced before a judge of the court of common pleas, under the act of the 13th of April, 1820, (sess. 43, c. 194,) to amend the act concerning distresses, &c., until the case has been finally tried and judgment given thereon, before the judge of the court of common pleas. *Lynde v. Noble*, 20 J. R. 80.

Nor will a writ of certiorari, though issued after judgment, stay the writ of restitution in such case. *Id.*

Wherever the rights of an individual are infringed by the acts of persons clothed with an authority to act, and who exercise that authority illegally, and to the injury of an individual, the party injured may have redress by certiorari. *Wildy v. Washburn*, 16 J. R. 49.

A certiorari to remove into the supreme court, the proceedings of three justices of the peace, appointing a town officer, on the neglect of the town to make the appointment, must be prosecuted in the name of the people; and, if it be brought in the name of the party aggrieved, the supreme court will make no order on the subject. *Id.*

On an appeal from the decision of commissioners of highways, to three of the judges of the court of common pleas, under the 36th section of the act to regulate highways, (sess. 36, c. 33; 2 N. R. L. 282,) if the decision of the commissioners is reversed, a certiorari will lie on behalf of the commissioners, to remove the proceedings into the supreme court; the right to bring a cer-

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torari being reciprocal, and belonging as much to the commissioners as to the appellants. *Commissioners of Kinderhook v. Claw*, 15 J. R. 537.

Wherever magistrates proceed judicially, both parties to the proceedings are entitled to be heard, and notice to both is indispensably necessary; notwithstanding there is no direction in the act by which the tribunal is constituted, the notice shall be given. *Id.*

And if notice is not given, a writ of certiorari lies to reverse the proceedings. *Id.*

A certiorari allowed after execution begun to be executed by the constable, is no *superædæas* to the execution. *Blanchard v. Myers*, 9 J. R. 66.

If, after making the levy, the constable take security that the goods shall be forthcoming on a certain day, and, in the mean time, a certiorari be regularly issued and served on the justice, it is no defence for not having delivered the goods at the time. *Id.*

A certiorari to remove an indictment for a forcible entry and detainer into the supreme court, is grantable of course. *The People v. Runkel*, 6 J. R. 334.

Proceedings under the absent and absconding debtor act are removable by certiorari. *Learned v. Duval*, 3 J. C. 141.

A certiorari, in a civil suit, removes the proceedings in the same state in which they were in the court below, and the supreme court must continue the proceedings from the point at which the court below left off. *Wolfe v. Horton*, 3 Cal. R. 86.

On a certiorari, the record itself is sent up, and though stated in the return to be only a copy, it will still be regarded as the record. *Id.*

A certiorari lies to the judges of the common pleas to remove proceedings on an appeal to them from commissioners of highways. *Lawton v. Commissioners of Cambridge*, 2 Cal. R. 179.

The court will not intend that proceedings which are not returned are irregular. *Id.*

A circumstance not stated in the return, as a fact, is to be disregarded. *Id.*

A circumstance stated in the return, which was not ordered to be returned, is to be disregarded. *Id.*

The delivery of a certiorari to the justice, supersedes his powers, and renders all subsequent proceeding, *coram non judice*, and void. *Case v. Shepherd*, 2 J. C. 27.

A plaintiff obtaining a judgment may have a certiorari, if, by the error of the justice, the amount which he was entitled to recover has been diminished. *Bissell v. Marshall*, 6 J. R. 100.

A judgment of non-suit, without awarding costs, is incomplete, and can neither be affirmed or reversed. *Monnell v. Weller*, 2 J. R. 8.

But a certiorari will lie to reverse a judgment of non-suit, when costs are awarded. *Smith v. Suttis*, 2 J. R. 2.

Napier v. Whipple.

[*88] *T. and A. NAPIER *against* WHIPPLE.

If, from a change of attorneys, a bail bond, taken by a plaintiff deputized to arrest, be lost, the court will, after verdict, grant leave to file common bail *nunc pro tunc*.

THE plaintiffs' original attorney had left this state before the return of the writ; the one now employed found, on search, a rule entered, to declare or be *nonprossed*. In consequence of which he served a declaration, received a plea of the general issue, went to trial, and obtained a verdict.

Emott, on an affidavit containing the above statement, and that, from having received no instructions or papers from the first attorney, he could not obtain the bail bond given in this suit, which was taken by one of the plaintiffs, who was specially deputized to make the arrest, moved to file common bail *nunc pro tunc*, which was, after slight opposition, [1]

Ordered accordingly.

[1] Common bail is in the same form as special bail, but differs from it in this, that the bail are merely fictitious, as John Doe and Richard Roe, and of course, has none of the incidents of special bail. It is only allowed to the defendant, where he has been discharged from arrest, without bail, after the return day of the writ, and is necessary, in such case, to perfect the appearance of the defendant. When filed, it is the business of the defendant to give notice of it; otherwise, the plaintiff may proceed to sue on the bail bond, or rule the sheriff as if no order had been made to discharge the defendant.

Thompson v. Payne.

THOMPSON and ADAMS *against* PAYNE.

If a notice of retainer of attorney be sworn to have been given on one side and denied on the other, for want of which a default has been entered, it will, with the subsequent proceedings, be set aside, on payment of costs, if accompanied with an affidavit of merits, and there is reason to think there has been some mistake.

MOTION to set aside a default and all subsequent proceedings, on an affidavit of merits by the defendant, and two affidavits by the attorney and his clerk, that a notice of retainer had been duly served on the agent of the plaintiffs' attorney, but which, from mis-apprehension of the christian name of Adams, had been entitled John Thompson and Charles Adams against the defendant.

On the opposite side, the attorneys of the plaintiffs swore positively, that they had never received any notice of retainer in the present suit, or any other in the title of which the christian name of Charles was used instead of Charles.

KENT, Ch. J. There must have been some mistake in this business, and as merits are sworn to, let the default and proceedings be set aside, on payment of costs.

Motion granted.

JACKSON, *ex dem.* COUNTER, *against* GILES.

If the service of notice be insufficient, the court will deny the application though unopposed.

ON reading the affidavit of service, it stated the notice to have been delivered to the clerk of the attorney, without saying where.

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Per Curiam. The service is on the face of it insufficient. We do not investigate the merits of any application which the other side does not oppose; because we construe silence into consent, and an acknowledgment that the law [*89] is with the person moving. But *we require the notice and affidavit of service to be read, because they are to conform to our own rules, all of which are known to the court. This reasoning, however, does not apply to transactions between the parties to a suit. The motion must, therefore, be denied, though there is no opposition.(a)[1]

Application refused.

(a) But if a party, relying on the court, should not, upon an insufficient notice, attend to oppose, and the court, not advertng to the insufficiency of the notice, should grant the application, the irregularity cannot be urged after a lapse of a term, even against a notice to tax costs on a judgment as in case of non-suit obtained on such insufficient notice; for the judgment will nevertheless stand good, and the defendant be entitled to his execution thereon, with costs for resisting an application to disturb it, if any be subsequently made. *Caines v. Brown*, October, 1812. It follows, from the above decision, that a lapse of a term purges the insufficiency of a notice for judgment as in case of non-suit; that a party should, therefore, on such insufficient notice, attend to oppose; and if he do not, that he should search to see if judgment be obtained on it, and, if it has, that he should move to vacate it the term next ensuing. This practice is said to be founded on the principle that *vigilantibus non dormientibus jura subveniunt*. But to sanction such proceedings on that maxim, seems rather a perversion of the rule. It is conceived that the axiom was intended to operate only against those who might come into court as plaintiffs or applicants, on stale grounds or defects, which, from lapse of time, they might well be deemed to have abandoned, or waived; but not to give to any period, however lengthy, the power of sanctioning error; of enabling a man to avail himself of his own wrong; of converting regularity into irregularity; injustice into justice; and, by his own quiescence simply, make either, or both, the basis on which to build a right in law. This idea may be illustrated by advertng to our statute law. By act of the legislature, a writ of error to reverse a judgment cannot be brought after the expiration of five years. But if the person who has obtained a

[1] The New York Code has the following provisions relative to the service of notices :—

Notices shall be in writing; and notices and other papers may be served

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Judgment revive it after that period by *act. fa.*, it becomes a judgment of the term in which revived, and against it any error in the original judgment may be assigned, though, in order to vacate it, had the party in whose favor it was rendered continued inactive, no measure could have been adopted, because a party cannot, by merely laying by, enable himself to take advantage of his own wrong; though to set aside his proceedings, had he continued inactive, no measure could have been taken. From analogy, therefore, it would seem, that, in the case cited in the note, where the defendant gave notice of taxing costs on his erroneously obtained judgment, he laid it open to all original objections; the case, however, seems to establish a contrary position, and that an irregular *ex parte* judgment is not at the peril of him by whom it has been obtained, but of him *against* whom it has been, contrary to all rule, unduly entered: a principle that seems opposed to the opinion of Lord Redesdale, who, in *Carew v. Johnston*, 2 Sch. & Lef. 300, says, "a decree taken *ex parte*, is taken at the peril of the party who obtains it, if he cannot support it by his pleadings and proofs. It is not a judgment pronounced by the court, but it is the act of the party, concerning what the judgment of the court would be if the other party had appeared."

on the party or attorney, in the manner prescribed in the next three sections, where not otherwise provided by this act.

The service may be personal, or by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office, by leaving the paper with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving it between the hours of six in the morning and nine in the evening, in a conspicuous place in the office; or if it be not open so as to admit of such service, then by leaving it at the attorney's residence, with some person of suitable age and discretion.

2. If upon a party, it may be made by leaving the paper at his residence, between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion.

Service by mail may be made, where the person making the service and the person on whom it is to be made reside in different places, between which there is a regular communication by mail.

In case of service by mail, the paper must be deposited in the post-office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid.

Where the service is by mail, it shall be double the time required in cases of personal service.

Notice of a motion, or other proceeding before a court or judge, when personally served, shall be given at least eight days before the time appointed therefor.

Where a defendant shall not have demurred or answered, service of notice or papers, in the ordinary proceedings in an action, need not be made upon

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him, unless he be imprisoned for want of bail, but shall be made upon him or his attorney, if notice of appearance in the action has been given.

Where a plaintiff or a defendant who has demurred or answered, or gives notice of appearance, resides out of the state, and has no attorney in the action, the service may be made by mail, if his residence be known, if not known, on the clerk for the party. *Yorhies' N. Y. Code of Practice*, pp. 305, 307, 308, §§ 408 to 415.

An affidavit of service on a clerk must state that he was at the time in the attorney's office. *Paddock v. Bebe*, 2 J. C. 117.

 WHITNEY against CROSBY.

When a note demandable immediately, is on interest from any given month without particularizing the year, it means the month of that name next antecedent to the date of the note. If there be one good count, and a demurrer put in to the whole declaration, judgment will be for the plaintiff, though a special cause be assigned, which is applicable to only one of the counts.

To a declaration on a note dated the 15th of July, 1808, acknowledging there was due to the plaintiff 188 dollars and 90 cents, on interest from the first day of June, with a second count for money had and received, the defendant assigned, as a special cause of demurrer to the whole declaration, the uncertainty in not specifying from what June the interest was to accrue.

Per Curiam. The first count is good, because certain to a common intent. When a day or month is mentioned as antecedent or subsequent to a contract, and the precise day or month is not specified, it means the time nearest to the date of the contract. As the money here was payable immediately, with interest from the 1st of June, it must mean the preceding 1st of June. It can have no other interpretation. A further reason why the plaintiff must have judgment is, the demurrer is to the whole declaration, and the second count is clearly good.

Judgment against the demurrer.

THURSTON *against* THE COLUMBIAN INSURANCE COMPANY.

If an assured be apprized by his master, of his pursuing another voyage than that insured, on which he has been sent, and do not disapprove of it, it is only a deviation and not barratry, though the master ultimately run away with the ship, sell her, and embezzle the proceeds.

UPON a policy on the sloop Dolores, Elihu Utley, master, from New York to the Havanna, and back again, valued at one thousand four hundred dollars.

The declaration was for a total loss by the barratry of the master. Plea, *non assumpsi*, and a verdict taken for the plaintiff, subject to the opinion of the court on the following case, made on behalf of the defendants.

By bill of sale, dated the 15th of July, 1841, Utley, in consideration of 1,200 dollars, conveyed the sloop Dolores to the plaintiff, who, on the 17th, effected the present insurance, and in the course of the same month the vessel duly sailed on the voyage described. On the 22d of August succeeding, Utley, after a safe arrival at the Havanna, wrote a letter to the plaintiff, informing him of the arrival of the vessel, and that he (Utley) had consigned *her to the house of Simon Poeys, but [*90] that, for want of a certificate from the Spanish consul, the sloop was not permitted to enter. On the third of September a second letter was written by Utley to his owner, mentioning the same impediment, and requesting the certificate to be forwarded. On the 15th, the plaintiff received the first letter of his master, who, on the 26th, wrote a third time, saying that the Dolores had the day before been permitted to discharge and depart from the Havanna, on giving security that the consular certificate should be produced within a specific time, but that having lost a second freight for New York, in consequence of the delay in transmitting it, he should accept of one, which offered

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for Charleston, to the amount of about 800 dollars, of malasses, to be shipped from the port of Haruco, about seven leagues to windward of the Havanna. That after having taken in this cargo, he should proceed to Charleston and from thence to New York, desiring insurance to be made on the vessel and freight. This letter was followed by another to the same effect, dated the 2d of October. The two letters written in September were received by the plaintiff in the beginning of November, about which time Utley, with the loading he had mentioned, sailed for Charleston, where he arrived the December after. From thence he wrote to the plaintiff, that finding no chance of a freight for New York, he had taken one for the Havanna, but was, by contract, to return to Charleston, and would, after that, proceed to New York, when he hoped to be able to discharge his obligations, of which he was not unmindful, adding, "do not be uneasy; I have the vessel fully insured for the voyage in case of any accident, that I may not fail of my present hopes, which are to make payment as soon as possible, as my account has been longer standing than I had any idea of at the time of contract." The plaintiff, on the receipt of this letter, caused inquiry to be made respecting the sloop, and found, that about two days after it was written, she had cleared out for the Havanna, from whence Utley wrote, that finding a good opportunity to sell the vessel, he should do so, though he was obliged to go to the Mantanzas for the money, and, when about to return to New York, would give timely advice, that insurance might be made, saying, "it was imposing on good nature to stay away so long, although he could do no better was the same to do again." After this letter had come to hand, another, on the first day of July, 1802, reached the plaintiff from St. Augustine, bearing date 28th [91] April preceding, *in which Utley mentions, that after selling the Dolores for a good price, he had been robbed of all the money, excepting 350 dollars, which was inadequate to discharge his debt to the plaintiff, but

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that he hoped in a short time to return and do it, when he would give satisfaction for his absence.

On the 15th of July, 1802, the plaintiff abandoned, adducing, as proofs of interest and loss, the bill of sale, and the letters above mentioned.

It was admitted that Utley had not returned, neither had he paid to the plaintiff the proceeds of the sloop, nor accounted with him for them.

Jones, for the defendants, made three points: 1st. That the voyage from the Havanna to Charleston, and the actual sailing of the *Dolores* from the Havanna to Haruco for a freight to Charleston, was either an abandonment, or a change of the voyage insured, or a deviation, and discharged the owners of their obligation; 2d. That the acts and conduct of the master must have been according to his duty and by the authority of the owner, or, if unauthorized, that the same were adopted, or acquiesced in by the owner; 3d. That the offer to abandon was made too late, being after the assured (having elected not to abandon) had lost his right so to do, if at any time he had such right.

As to there having been a deviation in fact, no question can be made. For, instead of returning to New York, the vessel sailed from Charleston. This, however, is explained to be a barratrous voyage. But to make it so, it must be in fraud of the owner, without his authority, and by a master who is not owner. It may well be inferred that the master of the *Dolores* was her owner; but if he was so, this I admit ought to be shown by the underwriter. Still, however, the circumstances evince the measures adopted were for the benefit of the owner; they could not, therefore, amount to barratry. *Kendrick v. Delafield*, 2 Caines' Rep. 67. But it is known in these West India voyages, very great discretionary powers are invested in the captains.

KENT, Ch. J. We do not see anything like barratry in

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the case, and should wish to hear the other side on this point.

Hoffman, contra. If Utley's going to Charleston was contrary to his duty, it was barratry. The benefit of his owner could not have been intended, for he has never since returned, and has actually gone off with the [*92] proceeds of the vessel. The frequent *communication kept up with the owner was only to lull into security, the more certainly to ultimately effect his barratrous design, and in this case, the first part of Utley's conduct is to be interpreted by the last; the running away with, and embezzling the vessel.

Per Curiam, stopping *Pendleton*, in reply. There is not sufficient evidence of barratry,^(a) and that is the only cause of loss stated.[1]

Judgment for the defendants.

(a) See *Kendrick v. Delafield*, 2 Caines' Rep. 68, n. (a), 69, n. (a) (b.)

[1] Barratry includes every species of fraud, concerning either the ship or cargo, committed by the master, in respect to his trust as master in the injury of the owners or shippers. *Cook v. Com. Ins. Co.*, 11 J. R. 40. The act, to be barratrous, must be done with a fraudulent intent. If a master, from any motive not fraudulent, should depart from the proper course of the voyage and a loss happen thereby, the underwriters would not be liable by reason of the deviation. *Grim v. Phoenix Ins. Co.*, 13 J. R. 451.

Bogert v. Lingo.

**BOGERT and MANSFIELD *against* LINGO, impleaded with
M'GUIRE.**

If the drawee of a bill be in partnership with the drawer, who, with another person, constitutes a distinct house, a promise by such drawee, after arrest, to pay the bill which he had before refused to accept, is no evidence that he is one of the house under the style of which the bill is drawn, though the signature be in the name of the drawee's partner, "& Co.," therefore, on such promise, an action cannot be maintained against such drawee, as drawer.

ASSUMPSIT against the defendants as the drawers of a bill of exchange, signed "M'Guire & Co.," addressed to "Cornelius Lingo," and indorsed "William Robinson."

M'Guire and Armstrong, constituting the firm of M'Guire & Co., drew the bill in question on Cornelius Lingo, who was one of the house of M'Guire & Lingo, but the two partnerships were in fact really distinct concerns, as appeared from the testimony of persons knowing both houses, and deriving their information from the partners themselves, as well as their mode of doing business. The bill being protested for non-acceptance, a writ was sued out against Lingo, who was taken, and while in custody, upon being shown the draft, promised, without having it read to him, that he would pay it if the plaintiffs would let him go another voyage. There was no testimony of the hand-writing of either drawers or indorser, or that Lingo made one of the house of M'Guire & Co., excepting such as might be inferred from the promise of Lingo. For the utter deficiency of all evidence on these points, the counsel for the defendant insisted at *nisi prius* on a non-suit. Being overruled by the court on the two first, the last was left to the jury, who found for the plaintiffs.

The case now came before the court on a motion for a new trial, on the same grounds as those urged at the circuit.

Haves, for the defendant. To entitle the plaintiffs to recover, they were bound to make out every position; the

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handwritings of the drawers and indorsers, and that Lingo was a partner in the house of M'Guire & Co. The holder derives title through the indorser, and must, therefore, prove his signature. Chitty, 201; Bayley, 115. The law is the same, though the bill be indorsed at the time of acceptance. *Smith v. Chester*, 1 D. & E. 654. The [*93] liability of *Lingo as a drawer, was only in consequence of his being a partner in the house of M'Guire & Co., which is so far from being established, that it is negatived. The promise to pay is immaterial; it was made as drawee of the bill, and therefore cannot be of avail in an action against the drawer. Besides, a promise when under arrest, is, as to that suit, a species of *duress*, and therefore void. *Rouse v. Redwood*, 1 Esp. Rep 155.

Bogert and *Hoffman*, contra. To prove the handwriting of the indorser is unnecessary in an action against the acceptor, because acceptance operates as an acknowledgment of the signature. *Hankey v. Wilson*, Say, 223. The promise to pay, in the present case, had the same effect. The *nisi prius* decision in *Espinasse*, is opposed to this doctrine. The point there was, that a promise to pay, made by a person ignorant of a fact by which he was discharged in law, would not, in favor of a person to whom such fact was known, create any responsibility. This reasoning does not apply to the case before the court. Whether Lingo constituted one of the house of M'Guire & Co., was matter for jury consideration. *Drake & Pinckney v. Whitaker and others*, (see the case,) 1 Caines' Rep. 184. The verdict has settled that he was.

Per Curiam. The judge ought to have non-suited the plaintiffs at the trial; the verdict must, therefore, be set aside, with costs to abide the event of the suit. There was not evidence sufficient that Lingo was one of the house of M'Guire & Co., who drew the bill, to let the cause go to the jury. It was a verdict clearly against the weight of evi-

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dence, and ruled wrong by the judge. The court, however, do not decide between the case in Sayer and that in D. & E.; nor whether it was, in the present instance, unnecessary to prove the hand-writing of the indorser, because it is not necessary to the judgment we now deliver.

New trial.

JACKSON, *ex dem.* RUSSEL and others, *against* STILES;
DOCKSTADER, tenant.
SAME *against* SAME; FREELICK, tenant.

Where there is an affidavit of notice of appearance, which is denied on the other side, a regular default and subsequent proceedings will not be set aside on stating a substantial defence without showing merits, or a mistake.

To set aside the default and proceedings in these causes, the defendants relied on an affidavit of their attorney's clerk, stating a service of notice of appearance and the consent rule, by leaving them, on the 17th January, 1804, between the hours of two and four in the afternoon, at the office of J. V. Henry, the agent for the attorney *of the plaintiffs, and that there were good and substantial defences. On the other hand, from the depositions of the plaintiffs' attorney, it appeared that Mr. Henry was not appointed their agent till July, 1804; that notice of appearance, &c., had not been received; that in one suit, a writ of possession had been sued out, in May term of that year, and executed in the vacation following, and that in the other, the tenant had compromised and bought the land of the lessor of the plaintiff. [*94]

SPENCER, J. The affidavits go only to there being defences, but this is no evidence of merits. See *Cogswell v. Vanderbergh*, 1 Caines' Rep. 156, n.(a). The proceedings

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have been perfectly regular on the part of the plaintiff, and nothing appears from whence a mistake could have arisen.

Application denied.

BROOKS *against* HUNT.

The defendant is entitled to move for judgment, as in case of non-suit whenever there is, after issue joined, time to notice for the next circuit, but if he has obtained time to plead, and from the nature of his plea, distant witnesses may be needed on which point it is necessary that the plaintiff's attorney consult with his client, who lives at some distance, though a stipulation may be excused, costs of applying must be paid.

ISSUE had been joined on the first of March last, but the cause, the *venue* of which was laid in the county of Albany, had not been brought on at the last April circuit.

Sanford, on these facts, moved for judgment as in case of non-suit.

Paris, contra, showed that the defendant had delayed the cause by obtaining time to plead till the first day of March; that, from the matter of the plea then delivered, there was reason to believe it would be necessary to *subpoena* witnesses from New-York, and that from the short interval between the receipt of the plea and the circuit, he had no opportunity of consulting with the plaintiff, who resided in the most westerly part of Montgomery. From these circumstances he argued that the motion ought to be denied without either costs of stipulation.

Sanford, in reply. The words of the statute are, (1 Rev. Laws, 353, s. 12,) that where issue is joined and the plaintiff "neglect to bring such issue to be tried according to the course and practice of the court," the defendant shall be

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entitled to judgment as in case of non-suit. From the 1st day of March to the circuit in April was time enough to notice.

Per Curiam. The defendant had a right to move, and, therefore, though we deny his motion, it must be on payment of costs; but, from the circumstances of the case, the plaintiff is excused from stipulating.

*THOMPSON, J. I do not think this according to [*95] practice. The cause was long enough at issue to allow of a notice, and he ought, therefore, to stipulate.

Motion denied, but costs allowed.

* * It was said by the bench, that in all cases the period within which costs are to be paid is twenty days.

LANSING *against* HORNER.

If, to set aside a default, &c., a defendant rely on the having forwarded notice of retainer, &c., to the agent of his attorney, and the plaintiff's attorney swear he never has received them, the court will not grant the application, unless the agent swear the papers never came to hand. See *Spencer v. Hulbert*, 2 Caines' Rep. 374, S. P.

EMOTT moved to set aside a default entered the 21st of January last, a judgment and execution thereon, upon the affidavit of the defendant, swearing to merits, and one from his attorney, stating that notice of retainer and of special bail had been in due time transmitted with the bail piece by the mail, to his agent in Albany, desiring him to serve them on the attorney of the plaintiff, and that he himself had never received a declaration.

Bleecker, contra, read an affidavit, setting forth that he had never received any notice of retainer or bail, and that he had proceeded regularly.

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KENT, Ch J. As the papers were sent to the party's own agent, why does he not show that he has not received them? This was his duty, and the not doing so is a palpable neglect. There is also a *laches* in not applying last term.

Motion denied.

DU BOYS *against* FRONK.

The residence of witnesses is a good cause for changing the *venue*, unless the plaintiff show he resides where it is laid.

SANFORD moved to change the *venue* in an action of covenant, from Dutchess to Montgomery, on an affidavit, stating that he had a great number of witnesses, all of whom, excepting one in Rensselaer, resided in Montgomery.

G. Van Ness, contra. The action is transitory.

KENT, Ch. J. We last term decided, that where the body of witnesses resided in a county different from that in which the *venue* was laid, (a) we would change it on the application of the defendant, unless the plaintiff show that he has witnesses where the *venue* is laid. [1]

Motion granted.

(a) See *Boyer v. Hildreth*, 1 Oaines' Rep. 4 n. (a).

[1] See Supreme Court Rule, 1852.

Beekman v. Franker.—Woods v. Hart.

BEEKMAN *against* FRANKER.

A regular default, &c., will not be set aside on account of the ignorance of the defendant, that it was necessary to employ an attorney, though there be merits.

It was ruled that ignorance of the necessity of employing an attorney, previous to the trial of the cause, is not sufficient to induce *the court to set aside a [*96] regular default and subsequent proceedings, though accompanied with a strong affidavit of merits.

WOODS *against* HART.

If any one mix with a jury on a writ of inquiry, the inquisition will be set aside, each party paying his own costs.

BOGERT moved to set aside the inquisition assessing very small damages, on account of the sheriff's having permitted a person to remain and converse with the jury, whilst deliberating on their verdict, though known to be inimical to the plaintiff, and rejected as a juror on that account.

Hoffman, contra. On inquests, after a default confessing a cause of action, there never is the same regularity as on a trial where the very right is questioned. It is not alleged that the man who remained with the jury spoke adversely of the plaintiff, or used any means to lessen the amount of damages.

Bogert, in reply. On an inquisition, the law is as jealous of the conduct of jurors as on a trial. *Stainton v. Peale*, 4 D. & E. 473. The oath of the constable is the same, and shows the same conduct is required in one case as the other.

 Howell v. Denniston.

KENT, Ch. J. No one ought to mix with a jury whilst deliberating. They should, to preserve the purity of justice, be kept by themselves, and on this point there is no difference between an inquiry before the sheriff, and a trial. The inquisition must, therefore, be set aside, each party paying his own costs. We order it thus, because neither is to blame; and, were we to direct them to abide the event of the suit, it would in fact, as there has been a default, be saying the defendant is to pay them. This case, therefore, is to be distinguished from that of granting a new trial after verdict for the misbehavior of the jury. There, each of the litigants has a chance in his favor, and ordering the costs on such an occasion to abide the event of the suit, does not necessarily impose them on either. Here the event is known.[1]

Inquest set aside.

 HOWELL *against* DENNISTON.

If a rule to plead be given on the return day of the writ, but before it is returned or bail entered, a default and all subsequent proceedings thereon, will be set aside, as being had before the defendant was in court. On a motion for irregularity, the want of merits is immaterial.

THE plaintiff in this cause filed his declaration *de bene esse*, and entered his rule to plead on the return day of the writ on which the defendant was taken, but the writ was not in fact returned till seven days afterwards.(a)

Blake, on these grounds, moved to set aside the default |

[1] As to cases in which a verdict of a jury will be set aside for irregularity or misconduct, see cases cited in note (b), *Smith v. Cheetham*, 3 Cal. R. 61.

(a) Note this; for otherwise, that is, if the circumstance of the writ not being returned be immaterial, this case would seem to do away all declarations *de bene esse*.

 Howell v. Denniston.

and all subsequent proceedings. He argued, that to entitle the plaintiff *to take default, he must himself be regular, and within the rules of practice. [97] That, by these, the defendant was not in court at the period when the rule to plead was entered. It was a demand, therefore, when there was no one to answer, and a plea cannot be required but of a party in court. The foundation of the proceedings had being the default, if that was bad, the whole must fall.

Emott, contra, read an affidavit showing, that though the rule to plead was entered before the writ was returned, yet the default was not entered till more than 20 days after the writ was actually filed, and that the defendant had confessed he had no defence. He contended that the return of the writ made good the entry of the rule by relation. Therefore, the instant it was on file, the defendant was to be considered as in court from the day of the return, and the want of merits was acknowledged.

KENT, Ch. J. The rule to plead was irregularly entered; because, until the writ be returned, bail filed, or an appearance entered, there is no basis for a proceeding, and the court has no cognizance of the cause, so as to authorize pleadings.(a) With respect to there being no merits, we never regard that when the application is for irregularity.(b)

Motion granted.

(a) See *Ross v. Hubble*, 1 Caines' Rep. 512.

(b) *S. P. De Poyster v. Willst. Warner*, 2 Caines' Rep. 45.

Bruen v. Adams.

M. and J. BRUEN *against* ADAMS and MERRILL.

If delay appear to be the object of a defendant, of which the having filed a frivolous demurrer is a cause of suspicion, the court will not set aside an inquest taken, though the defendant swear the action is for more than is due; he ought to state "that he has a defence, as advised by his counsel."

WOODS moved to set aside an inquest taken early in the last New York sittings, in the absence of the defendant's attorney, on an affidavit stating, that the demand was for more than was actually due, and the cause stood so low down in the calendar as No. 116.

T. L. Ogden, contra, read a deposition, showing that the attorney for the defendants had acknowledged delay would be desirable, under their then embarrassed circumstances, and that a frivolous demurrer had already been filed and overruled. He contended also, that the affidavit of the defendants was insufficient, in not expressly averring there was a defence.

Woods, in reply. The same thing is in substance done. All inquests at a circuit are at the peril of the party. *Roosevelt v. Kemper*, 2 Caines' Rep. 30.

THOMPSON, J. The practice I adopted was, that if the defendant's counsel said there was a defence, I did not allow it to be taken.

[*98] **Per Curiam.* The affidavit is defective in not saying there is a defence "as advised by counsel." (a) In this case there has been a frivolous demurrer, and that is a very suspicious circumstance. The defendants, therefore, take nothing by their motion.[1]

(a) See *Lusher v. Walton*, 1 Caines' Rep. 151, n. (b.)

[1] See Supreme Court Rule, 36 of 1852.

Holmes v. Williams.

HOLMES *against* WILLIAMS.

is an action of false imprisonment be brought for taking the plaintiff in execution on a *ca. sa.* in which the costs are by mistake larger than those actually awarded, the court will give leave to amend the execution; and the papers on which the application is made, may be titled as in the suit for false imprisonment.

THE defendant, in a suit against the plaintiff, the *venue* of which was held in Albany, had obtained a judgment in which the costs awarded were 9 dollars and 12 cents, and on the supposition, that the original *ca. sa.* had issued into Columbia, sued out a *testatum ca. sa.* inserting 14 dollars and 44 cents. The now plaintiff, having been taken on this writ, brought the present action for false imprisonment.

Williams, on an affidavit disclosing the above facts, and adding that he did not personally issue the execution, or ever see it, or knew of the mistake till the sixth day of the present month, moved to amend the *testatum ca. sa.* by expunging the 14 dollars and 44 cents, and inserting 9 dollars and 12 cents.

Van Wyck, contra. This is an application in one suit, to amend mistakes and errors in another. If the amendment is to be in the cause of *Williams v. Holmes*, the papers ought not to be entitled in that of *Holmes v. Williams*. The motion goes to take away the basis and foundation of our action.

 Shawe v. Colfax.

SHAWE and BARKER *against* R. COLFAX, W. COLFAX, and RICHARDS.

If all the defendants in a suit be not brought in, and those who are, give a rule to declare, the plaintiff must either do so or obtain a further time, to entitle to which, from time to time, showing that he is proceeding to outlawry against those not found, is sufficient; but if he do neither the one nor the other, he will be liable to a *nonpro* by those brought in.

On the last day of February term, the defendants, Robert Colfax and Alexander Richards, entered a default against the plaintiffs for not declaring.

Hopkins moved to set it aside, together with the subsequent proceedings on these facts.

In November term last, the *capias* issued was returned "taken," as to Robert Colfax and Alexander Richards, and "not found," as to William Colfax, to arrest whom several ineffectual attempts had been made, as he resided in New Jersey, and either did not come into New York at all, or did it so secretly as to avoid the process sued out, but on that account, the idea of proceeding against him. [*99] *was not relinquished; on the contrary, an *alias capias* had been sued out, under the belief, that he had received information of the former writ, but, before it was issued, a rule to declare against the other two defendants had been served, upon which the present default had been entered.

He argued, that at common law the plaintiff could not proceed till all the defendants were brought in; and though by statute(a) a different practice might be pursued, still it was at the election of the plaintiff, and, therefore, no advantage could be taken of the omission. For this he cited Tidd's Practice, 376—379.

D. A. Ogden, contra. Had the proceeding been by

(a) Act for the amendment of the laws, 1 Rev. Laws, 353.

Shawe v. Colfax.

original, the authority relied on might have applied, but as it is by bill, the plaintiffs have placed themselves in the same situation as if all the defendants had appeared. If necessary that all the defendants should be brought in, the plaintiffs should have obtained an order to enlarge the time for declaring. According to the practice now contended for, a defendant may be kept under bail for his life.

Hopkins, in reply. Whether the proceeding is by bill, or original, is immaterial. The distinction is, whether the suit be in trespass or on contract. In the former they may sever, in the latter they cannot; as they, therefore, must be proceeded against jointly, they cannot separately *non-pros*. Suppose the only solvent defendant not to be taken, must a plaintiff go on against a person from whom nothing can be recovered? The inconvenience alone of such a principle is a sufficient argument against it.

Per Curiam. The plaintiffs should have applied for further time to declare, and shown either that they were endeavoring to bring all the defendants into court, or pursuing one to outlawry. That would have been a good ground to enlarge the rule from time to time. Not having done so, and being authorized by our act to proceed against the defendants brought in, the plaintiffs were liable to be *non-prosced* equally as if all the defendants had been before us

Motion denied.

 Robinson v. Fisher.

 ROBINSON and HARTSHORNE *against* FISHER.

In *assumpsit* a plea that the promise was by the defendant and one of the plaintiffs jointly, and not by the defendant separately, must be pleaded in abatement; if it be pleaded in bar, the plaintiff may treat it as a nullity for want of the affidavit, and enter a default as for want of a plea.

To a declaration on a promissory note, the defendant pleaded in bar, that the *assumpsit* was by him and [*100] Robinson jointly, and *not by him separately.(a) The plaintiffs' attorney, considering the plea a nullity, entered a default.

Woods moved to set it aside, and cited in support of the plea a precedent in 3 Went. 114. He said, also, no plea could be treated as a nullity, unless it appeared on the face of it to be frivolous. In all other cases the court would drive the defendant to his demurrer.

G. Ogden, contra. The matter of this plea is clearly in abatement; and if so, might, for want of being verified by affidavit, be treated as a nullity. 1 Sell. 301.

LIVINGSTON, J., delivered the opinion of the court. This is a dilatory plea, the definition of which is, that it only delays the suit by questioning the propriety of the remedy, rather than by denying the injury. Thus the injury com-

(a) See *Mainwaring v. Newman*, 2 Bos. & Poll. 120, in which such a plea as the present was held good on demurrer, on the authority of *Moffat v. Van Mülkingen and others*, East, 27, G. III., B. R. declaring that the matter was not pleadable in abatement. It is manifest that the plea in the case in the text could not have been in abatement, because every plea in abatement is bad, that shows the plaintiff cannot sue at all; it must give a better writ; where that cannot be done, the plea must be in bar. *Evans, q. d., v. Stevens*, 4 D. & E. 224.

In 1 Went. Plead. 17, 18, a plea, like that in the text, by Sir Vicary Gibbs, drawn in abatement, was relinquished because he thought it ought to be in bar. See *Addison v. Overend*, 6 D. & E. 786, and note the distinction where a party suing is one of those liable with the defendants.

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plained of here is not denied, but that it was committed with another. If it be a plea of this description, it wants the verification required by statute, and is therefore bad. Even as a plea in bar, I should not be for countenancing it, for it is totally out of the usual form of a general issue which it was intended to try, and which would have answered as well, and furnished a record in the common form.[1]

Motion denied.

SCHENCK and TEN BROECK *against* WOOLSEY.

On a *scilicet* to revive a judgment of twenty years standing, if an inquest has been taken because the defendant's counsel was not prepared to adduce his discharge, long ago obtained under an insolvent law, and the defendant himself, from remoteness of distance and bodily infirmity, could not attend; the court, on being satisfied that the discharge was obtained, will set aside the inquest to let in proof of it, though the defendant be shown to be of sufficient ability to pay; for a court of law cannot notice the moral obligation to pay debts, from which a debtor has been by law discharged, unless a new liability has been incurred; but this will be done only on payment of costs. A counsel at *not prius* must, if asked, answer whether his client has a defence or not.

In *scire facias*, to revive two judgments, one for 4,224*l.*, the other for 1,718*l.*, obtained in 1783, inquests had been taken at the sittings in December, 1803.

D. A. Ogden, under an agreement that the application should be considered as in time, moved to set them aside on affidavits, which contained in substance these facts.

The defendant, who lives at Plattsburg in the county of Clinton, was, in 1785, duly discharged under the then insolvent law of the state. In February, 1803, the declara-

[1] The non-joinder of parties defendants can be taken advantage of only by plea in abatement. See *Page v. McCrea*, 1 Wend. 164.

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tions were filed, to which payment was pleaded, with notices subjoined of giving the discharge, &c., in evidence; but as, on procuring a copy of the proceedings under the insolvent law, the discharge itself could not be found, the attorney of the defendant wrote to him in the August following, communicating this circumstance, and re-
[*101] questing him *to make inquiry after it. On the cause being noticed for trial, on the 12th of December in that year, the defendant's attorney again wrote to him, repeating the contents of his former letter; and urging him to personally attend, that measures might be taken to procure the discharge, or substantiate, by parol evidence, its former existence and loss. The first of these letters did not reach the defendant till the middle of September, the latter not till the 29th of November then next. To each of these the defendant replied, stating that in consequence of a fractured leg, he was utterly unable to travel, and desiring the trial to be postponed till the February following, as, by that time, he hoped to be able to procure the discharge, which had been given to Mr. Du Boys, the then sheriff of Dutchess, to warrant his release from confinement. The first of these answers never came to hand, and the latter, which was received, bore date on the 18th of December; but though the discharge itself was not found, the attorney employed for the insolvent, who was also assignee of his estate, swore that the discharge had been obtained on a due and full adherence to the requisites of the act, and that he was then petitioning congress for the lands to which the defendant was entitled, as an officer in the revolutionary army, in consequence of their having passed by the assignment of the insolvent's estate. None of these circumstances, however, appeared when the inquests were taken; for the counsel of the defendant, when the causes were called on, refused to answer the court whether there was any defence; thinking that he was not bound to do so, and in consequence of this silence the inquests were taken.

This detail, *Ogden* insisted, furnished indisputable evi-

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dence that there was a good and substantial defence, according to the affidavit of the defendant, and that the court had not, at the circuit, any right to oblige either the counsel to assume the responsibility of answering for a defence, or the defendant to disclose the nature of that on which he relied. That a discharge had been fairly obtained was evident, and had the cause been tried, would have been substantiated by parol evidence, though the discharge itself might not have been produced.

Evertson, contra. The practice of taking inquests is necessary to expedite justice, and is the right of the plaintiff. Every fact now shown was in the power of the defendant at the time that inquest was taken, and might have been then availed of. The nature of the defence is *stricti juris*, and therefore not to be *favored; for, [*102] though in law the debt is gone, the moral duty still remains, and the plaintiff swears he believes the defendant to be of sufficient ability. At all events, the apparent *laches* was enough to prevent the granting the motion.

Per Curiam. The inquest is regular. Counsel, if present, ought to answer whether they believe there is a defence. The time at which a trial shall come on is not the privilege of a defendant, but is adopted from a regard to the seniority of issues. Infinite delay would take place in cases where no dispute exists, if the counsel were to be mute when required to state whether there be a defence. It appears, however, that the defendant has been discharged under an insolvent act, and by accident has not been able to produce his discharge to his attorney. But though the court will not decide, in this way, whether parol evidence might, or might not be given of its loss and contents, yet they will regard the peculiar situation of parties. In this case the defendant lives remote, and was, from that circumstance and infirmity, prevented from attending to these

Anonymous

suits at an earlier period. The moral obligation, under which the defendant is supposed to labor, of paying his debts, is not to operate with the court, unless a new liability has been incurred. From the misconception of counsel, the remote distance of the defendant, his infirmities, and his having a meritorious defence, the court grant the application, upon payment of costs.

Motion granted.

ANONYMOUS.

The court will not permit the general issue to be withdrawn to let in a plea in abatement delivered in time.

THE court refused to permit the general issue to be withdrawn to let in a plea of coverture in abatement, pleaded in person, but delivered after service of the general issue, though the defendant swore the general issue was pleaded without his knowledge, by a person he never meant to retain as attorney, and the plea in abatement was delivered in due time and received by the plaintiff's attorney.(a)

(a) If a party on whom a pleading is delivered, treat it as duly served, he cannot object to the want of a previous step with which it was in his power to dispense. *Williams v. Strahan*, 1 New Rep. 309. See *McNealy* ad. *Morrison*, Cole. 61, where an implied recognition in the suit, of the attorney named in a second notice of retainer, was held to oblige the plaintiff's attorney to serve the proceedings on him.

Bayard v. Malcom.

BAYARD *against* S. B. and R. M. MALCOM.

Forgetting the commencement of the term, if the excuse be *bona fide*, is sufficient for not noticing for the first day. If a counsel has a known partner who transacts the attorney's business, an excuse arising from the personal conduct of the counsel, may be availed of in a suit in which the partner's name only appears on the record.

THE notice of motion was not for the first day of term.

Munro accounted for this, by an affidavit stating that he had absolutely forgotten the day on which the term commenced, imagining it to be one week later than it really was.

**Harison*, contra, objected to the reception of [*103] this excuse, as Mr. Towt was the attorney on the record, therefore, for him, the forgetfulness of Mr. Munro could afford no excuse.

Per Curiam. There can be no doubt of the mistake, nor but that the whole is in good faith.

Though Mr. Towt appears the attorney on record, every one knows the connection between him and Mr. Munro. He is to be supposed to act only under the direction of Mr. Munro.

Motion granted.

STRYKER *against* TURNBULL, DENTON and VOORHEES.

A town contributing to the expense of a suit is a ground for moving for a foreign jury, and the court will easily be induced to grant it in Long Island causes which involve a right of fishing.

HARISON, on behalf of the defendants, moved for a foreign and struck jury, to be taken from the city and

Stryker v. Turnbull.

county of New York, on an affidavit, stating that the suit was prosecuted at the joint expense of the inhabitants of the town of Gravesend, in Kings county, who had combined for the maintenance of a supposed right, claimed by them as inhabitants of the said town, of erecting huts, for the purpose of fishing, upon the lands of the defendants; of taking and heaping up sea weed, and carrying it away at their pleasure, and that other claims and disputes, in some respects of a similar nature, exist in the neighboring county of Richmond.

Baldwin, contra. The same principle would warrant the application in most insurance causes. Those interested in a point contribute their *quotas* towards the defence. No more is done here. But why not take the jury from Queens, or any other county in Long Island?

KENT, Ch. J. This is a cause in which the right of fishery will come in question. Where the counties are so small as those mentioned, an impartial trial cannot be had on a claim of a general nature. New York is as near as any other, and where a right of fishery, or any similar claim is to be litigated, it is, in my opinion, sufficient to take the matter from a Long Island jury. The expense is at the door of the party who applies, and the contribution to support the suit shows strongly the disposition of the county.(a)

Motion granted.[1]

(a) See *Spencer v. Sampson*, 1 Calnes' Rep. 498, note (a.)

[1] A foreign or struck jury will not be granted, except in extreme cases. *Patchin v. Sands*, 10 Wendell, 569. A motion was made in this case for a foreign or struck jury, on the ground that the venue was necessarily laid in the county of Kings, that a majority of the jurors would most probably come from the village of Brooklyn, that the suit grew out of a long agitated controversy, between the public officers of that village and the plaintiff, relative to a contemplated improvement in the opening of a street, and that the plaintiff believed that there would not be a fair and impartial trial of the cause by jurors of the county of Kings.

By the Court, *Sutherland, J.* The jurors from Brooklyn, if incompetent by

The People v. Burdock.

*THE PEOPLE *against* BURDOCK and CASE. [*104]

IF a record of an indictment be lost, the court will grant leave to file one *nunc pro tunc*.

AN indictment found against the defendants for a forcible entry and detainer, in April term, 1798, had, on being removed into this court, been quashed, and restitution ordered, but the record of it could not, on search in the clerk's office, be found.

Ruler applied for leave to file a record *nunc pro tunc*, on an affidavit by the attorney employed in the prosecution, disclosing the above facts, and that, on an examination of his register, he found not only that a record had been duly filed, but that he actually obtained an exemplification of it, which had been lost.

Granted accordingly.

reason of prejudice or interest, may be objected to. It cannot be believed that after the jury-box is properly sifted, twelve impartial men cannot be found in the county of Kings to try this cause. Parties deceive themselves in the estimate of the extent of interest which the public at large take in their controversies. In the case of *Poucher and Livingston*, which arose in the county of Columbia, the evidence of public interest in the matter in controversy was very strong, and the court, under the circumstances of the case, hesitated whether a motion for a foreign or struck jury ought not to be granted; but in view of the inconveniences inseparable from such an order, the motion was denied. So in this case the motion must be refused. It will be time enough for the court to interfere, by directing the cause to be tried otherwise than by an ordinary jury, after they shall have become convinced of its necessity by the verdict which shall be rendered.

Motion denied.

Delavan v. Baldwin.

DEHAVAN *against* BALDWIN.

After issue joined, the defendant may move to change the *venue* when all his witnesses reside in the county to which it is to be changed.

MOTION, by the defendant, to change the *venue* from the city and county of New York to Onondaga.

In November last, at which time the plaintiff was entitled to enter a default for want of a plea, notice of a similar motion was given, but, from the papers not having been received in season by the agent of Baldwin's attorney, the application was not then made. In April, a plea of the general issue was given and received.

Hopkins, on these facts, argued, that though the general rule as to changing the *venue* by a defendant was, that it should not be granted after plea pleaded, (*Dickenson v. Fisher*, 2 Stra. 858;) yet, as the plaintiff might, in an indirect way, at any time, do it by moving to amend, (*Savery v. Serle*, Say. 150; *Griffith v. Hollier*, *ibid.* 294;) there could be no reason why a similar indulgence should not be accorded to the defendant. In addition to this, the defendant swears that the cause of action, if any, arose in Onondaga, in which county the witnesses resided by whom he could prove the facts contained in the notice subjoined to his plea. *Foster v. Taylor*, 1 D. & E. 781, is in point.

Munro, contra. The defendant is too late.

KENT, Ch. J. I am of opinion the *venue* ought to be changed, as there has been no loss of trial, and there will be no delay. This, I think, ought to be the regulating principle, as these applications are to the discretion of the court.

LIVINGSTON, J. I am against departing from the prac-

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tice by which defendants are restricted from making these motions after *plea pleaded. Nor do I think [*105] there is a sufficient reason for not having asked for this favor in November last. But what weighs greatly with me is, that the application is on the eve of a circuit, and may impose rather hard terms on the plaintiff.

SPENCER, J. I concur in the sentiments of my brother *Livingston*.

THOMPSON, J. The only difficulty, in my mind, was with regard to this request being after issue joined, subsequent to which, all increase of expenses ought, if possible, to be avoided. But as no delay will be created, I think we ought to grant the rule, and had the plaintiff shown any hardship likely to arise from it, we might have imposed such terms as to prevent any injury. The *laches* I consider to have been entirely waived by accepting a plea.

TOMPKINS, J. That is the opinion I entertain. When a plaintiff receives a plea which he is not obliged to take, he cures the antecedent *laches*. I agree, therefore, with the Chief Justice and Mr. Justice Thompson.[1]

Venue changed.

[1] A motion to change the venue must be made at the earliest practicable day, and in such season that, if it be denied, the plaintiff will not lose a trial in a county where the venue was laid; if made at a later term it will be denied for that cause; and ignorance of the practice, on the part of the defendant's attorney, will not excuse the delay. *Moreland v. Sanford*, 1 Denio, 660.

A defendant is not bound to move for change of venue, before plea put in, but, if he moves after plea, and the effect of his delay is to throw the plaintiff over a circuit, the motion will be denied with costs. *Anon.*, 18 Wen. 514.

In legal action, if the venue be not laid in the proper county, the defendant may avail himself of the error by demurrer, if it appear upon the record; or by motion for non-suit at the trial, if it does not so appear. *Rightmyer v. Raymond*, 12 Wen. 51.

In an action against a public officer, for acts done by him by virtue of his office, the venue will be changed, on his application, to the county where the

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fact complained of happened; but, if there be a dispute whether the action be or be not local, the motion will be disposed of upon the usual ground. *Allen v. Forshay*, 12 Wen. 217.

Where, from the course pursued by a defendant in obtaining orders to stay proceedings, and, among others, an order staying proceedings to enable him to move to change the venue, it is manifest that the object is delay and the plaintiff outnumbered him in witnesses, the motion to change the venue will not only be denied, but it will be denied with costs. *Kilbourn v. Fairchild*, 12 Wen. 293.

On a motion to change the venue, the plaintiff must swear unqualifiedly that he has witnesses in or near the county where the venue is laid, of an equal number with those of the defendant, or a greater number, or the venue will be changed. *Sherwood v. Steele*, 12 Wen. 294.

The defendant moved to change the venue from Oneida to Chenango county, on an affidavit that he had twenty witnesses in the latter county; further stating, that the action was brought to recover attorney and counsel fees in several suits conducted by the plaintiff, while living in the county of Chenango; and that, if the plaintiff should claim to have more than one witness (naming him) in the county of Oneida, they could only be material for the purpose of proving the value of the services, for which the plaintiff sought to recover; which might as well be proved by witnesses residing in the county of Chenango; the plaintiff's affidavit in opposition stated that he had twenty-five witnesses in Oneida, but stated nothing about that part of defendant's affidavit which was special; it appeared that ten of the witnesses of the plaintiff were attorneys and counsellors at law. Motion granted. *Benedict v. Hubbard*, 5 Hill, 509.

If a defendant is outnumbered in witnesses, on a motion to change the venue, he cannot renew his motion by alleging a greater number of witnesses than originally stated by him; if he does, he will be subjected to costs. *Purdy v. Wardell*, 10 Wen. 619.

The venue will not be changed, if the motion for that purpose is not made until after issue joined, and it appears that the plaintiff, if successful on the trial, will lose a term in entering a judgment if the motion be granted. *Lee v. Chapman*, 11 Wen. 186.

But, where the defendant is not chargeable with *laches*, the loss of a trial on a term will be no reason for refusing the motion. *Garlock v. Dunkle*, 29 Wen. 615.

The suit was commenced by the service of a declaration at so late a day that regular notice of trial could not be given for the next circuit; the defendant was not bound forthwith to serve notice of motion to change the venue, so as to give the plaintiff an opportunity to consent to the proposed change, and to require the acceptance of short notice of trial. *Ib.*

The venue will be changed, although the affidavit omit to state that the witnesses are each and every of them material, where there are no witnesses in the county where the venue was laid. *Brown v. Peck*, 10 Wen. 162.

Where the object of an order enlarging the time to plead manifestly is to

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throw a plaintiff over the circuit, a motion to change the venue, made in the meantime, will be denied. *Haywood v. Thayer*, 10 Wen. 571.

In an affidavit to found or resist a motion for change of venue, the party must state that his witnesses are each and every of them material, and that, without the testimony of each and every of them, he cannot safely proceed to trial. *Constantine v. Dunham*, 9 Wen. 431.

Where the defendant applies to change the venue in a cause, after the same has been noticed for trial at the circuit in the county where the venue was laid by the plaintiff, and the trial is put off on the application of the defendant, the motion will be granted on payment of the costs of the circuit and of resisting the motion, and on the defendant's stipulating to take short notice of trial. *Carpenter v. Watrous*, 5 Wen. 102.

The fact that the circuit judge of the district in which the county is situated where the venue is laid in the declaration, was, previous to his appointment, counsel in the cause, is sufficient cause to change the venue. *Van Rensselaer v. Douglass*, 2 Wen. 290.

The residence of witnesses in an adjoining state, adjacent to the county where the venue is laid, is not sufficient to retain the venue, if a change of it is properly applied for. *Peet v. Billings*, 2 Wen. 282.

To entitle a party to an order to remove a cause from the superior court of the city of New York into this court, or to a rule to change the venue, he must state that the witnesses named by him are each and every of them material to his defence, as he is advised by his counsel and verily believes, and that without the testimony of each and every of them, as he is also advised by counsel and verily believes, he cannot safely proceed to the trial of the cause. *Anonymous*, 3 Wen. 425.

Where no venue is laid in the body of the declaration, reference may be made to the venue in the margin, and that is sufficient. *Slate v. Post*, 9 J. R. 81.

The venue will not be changed on the application of one defendant, when there are several defendants in a cause. *Sally v. Hutton*, 6 Wen. 508.

The residence of a greater number of witnesses in an adjoining state, adjacent to the place of trial laid in the declaration, is not sufficient to retain the venue, although the plaintiff has obtained the assurances of his witnesses to attend, &c. *Bank of St. Albans v. Knickerbacker*, 6 Wen. 541.

The affidavit to change, or retain the venue, on the ground of a balance in the number of witnesses, must state that each of the witnesses are material, &c., without each of whose testimony, &c., as advised, &c. *Anonymous*, 7 Cow. 102.

The affidavit for a change of venue should state that the witnesses, on account of whose place of residence the venue is sought to be changed, are such, that under the advice of counsel, the party cannot safely proceed to trial without them. *Satterlee v. Groot*, 6 Cow. 33.

The affidavit for a motion to change the venue must state the names of the witnesses. *Anonymous*, 6 Cow. 389.

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And also that, as the party is advised by counsel and believes, he cannot safely proceed to trial without the testimony of each of them. *Id.*

And it ought to be added, that evidence will be given of some material fact happening in the county to which he seeks to remove the venue. *Gourley v. Shoemaker*, 1 J. C. 392. S. C., C. C. E. 103.

Debt on judgment is not a local action; and the venue may be laid in any county in the state, without regard to the place of filing the record, or the venue in the original cause. *Goodrich v. Colvin*, 6 Cow. 397.

Where the action for rent is founded on privity of contract, as between the lessor and lessee, it is transitory; otherwise if on privity of estate, as where an assignee is a party. *Bracket v. Alford*, 5 Cow. 18.

In a transitory action, the venue will not be changed from one county to another, on the ground of the number of witnesses, unless the number in the latter exceed those in the former. It is not enough that the number is equal. *Wood v. Bishop*, 5 Cow. 414.

The change of venue in an action for a libel dispersed in several counties, depends on the same principles as in an action on contract; and a change of venue will accordingly be denied, unless there is a decided preponderance of witnesses, or some other strong circumstances in favor of the change. *Rout v. King*, 4 Cow. 403.

That witnesses reside in a neighboring state, near the place where the venue is laid, is not a reason for retaining it. *Canfield v. Lindley*, 4 Cow. 532.

In an action for a malicious prosecution in a neighboring state, the plaintiff may lay his venue in any county of this state, and retain it there, on stipulating to give material evidence arising in the county where it is laid, though the defendant have a greater number of witnesses residing in the county, to which he moves to change the venue. *Hall v. Coe*, 4 Cow. 15.

And this, too, though the cause of action in another count, in trover, in the same declaration, arose in the county to which he moves to change the venue. *Id.*

Replevin is a local action, and in general the venue will not be changed from the county where the cause of action arose. *Atkinson v. Holcomb*, 4 Cow. 45.

If there be any exception to this rule, as where the action is in nature of an ordinary action of trespass *de bonis asportatis*, yet the plaintiff may retain his venue upon the usual stipulation. *Id.*

The affidavit to change the venue must state the advice of counsel as to the materiality of witnesses. *Johnson v. Rogers*, 3 Cow. 14.

The affidavit need not be in terms, that the party "has fully and fairly disclosed the facts he expects to prove," &c.; but will be sufficient in this respect, if it set forth simply that "he has stated the facts," &c. *Anon.*, 1 Hill, 668.

Nor is it essential that, in respect to the value of the expected testimony, it should say, the witnesses are each, &c., material to his defence; other

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equivalent words may be substituted: as, that they are material, &c., "for the defendant," &c. Ib.

A defendant, who is a counsellor of this court, making an affidavit to change the venue, need not swear to the advice of counsel that his witnesses are material. *Cromwell v. Van Rensselaer*, 3 Cow. 346.

For the purposes of the motion, the court will take notice that he is of the degree of counsel. Ib.

It seems that the plaintiff may retain his venue by stipulating to pay the expense of the defendant's witnesses. *Harrower v. Betts*, 2 Cow. 496.

But the defendant has no right to a change of venue by stipulating to pay the expense of the plaintiff's witnesses. Ib.

The usual clause in the act dividing a county, that the division shall not affect any suit or action, &c., (*vide* ss. 46, ch. 30, s. 2, in relation to Yates county,) applies to the venue, and retains the place of trial in the old county, *Jackson ex dem. Dains v. Dains*, 2 Cow. 526.

An affidavit to change venue, on the ground of witnesses residing in another county, need not show the nature of the action. *Anonymous*, 1 Hill, 668. 4 N. Y. Dig., p. 1359, *et seq.*, tit. *Venue*.

ROOSEVELT against DEAN.

All objections to the bringing on a motion must be made before the grounds of it are entered into; if not, they will be considered as waived.

The court will infer that what ought to be inserted in an affidavit, and does not appear, did not exist.

AFTER a lengthy and desultory argument, the counsel for the plaintiff took an exception to the titling the notice of-motion, and affidavit on which founded.

Per Curiam. All objections of this sort ought to be submitted as preliminary questions. We are not to sit here, have the grounds of motion laboriously investigated on a long discussion, and then have a matter of mere form pressed upon us. The entering into the argument is a waiver of all objections against its coming on.

* * *The Court*, in this cause, said, that when an affidavit does not state that which ought to be alleged in support of

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the motion, the presumption is, it could not be asserted, and the inference of the bench will be against the party guilty of the omission.

JACKSON, *ex dem.* LEWIS and others, *against* VAN LOON.

A commission to be executed out of this state, may be directed to persons residing within it.

WOODWORTH moved for a commission, to be directed to persons in this state, to take the examination of witnesses in Pennsylvania.

[*106] *Riggs, against its being allowed, urged the direction.

Per Curiam. The act(a) does not specify that the commissioners should live in the state to which the commission is addressed.

Take your motion.[1]

(a) For the amendment of the law. 1 Rev. Laws, 351, s. 11.

[1] Has the court power to grant a commission to examine witnesses in a place, where the affidavit cannot be authenticated in such place in the form prescribed by the statute? *North River Bank v. Rogers*, 22 Wen. 649.

An insurance company, acting as a receiver in relation to claims against the former capital and assets of the corporation, is not entitled to a commission to examine witnesses; where the matter in controversy has been submitted to referees under a special statute authorizing such proceeding. *Wood v. The Howard Ins. Co.*, 18 Wen. 646.

It seems that such commission can issue only where there is an action pending in a court of record, and an issue joined upon pleadings in the forms prescribed by law. *Ib.*

No commission can, therefore, be granted in a proceeding under the statute against an absconding, concealed, or non-resident debtor. *Matter of Whitney*, 4 Hill, 534.

Where a commission to take testimony is sued by the plaintiff, in which the defendant joins and furnishes cross interrogatories, and the commission, with the depositions of witnesses be returned; and it does not appear that

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the last general cross interrogatory has been put to and answered by the witnesses, and the defendant on that ground objects to the reading of the depositions in evidence, the objection in general is fatal. *Kimball v. Davis*, 19 Wen. 437. S. C., 25 Wen. 259.

The plaintiff, however, is at liberty in such case to show that the commission was executed, and the deposition signed by the witnesses in the presence of the counsel of both parties, and that no objection was made at the time by the counsel for the defendant, that all the interrogatories were not answered; and on such facts appearing, the depositions will be received, notwithstanding the objection. *Ib.*

It seems, that though the interrogatory was not put, or the answers suppressed, that an objection on that ground could not be taken at the trial, if the counsel of the party was present at the execution of the commission, and did not then object; the remedy, if any, would be by motion to quash the return to the commission. *Ib.*

The declarations of witnesses, made subsequent to their examination under the commission, and the execution of it, contradicting or invalidating their testimony, are inadmissible, until they have been examined on the point, and an opportunity given to them for explanation or exculpation. *Brown v. Kimball*, 25 Wen. 259.

On a motion for a commission to examine witnesses, the party applying must allege in his affidavit that he has fully and fairly stated his case to counsel, and disclosed to him what he expected to prove by his witnesses. *Seymour's Ex'rs v. Strong*, 19 Wen. 98.

The marine court of the city of New York have power to issue a commission to examine witnesses residing abroad. *Watson v. Smith*, 13 Wen. 51.

On a motion for a commission to examine witnesses, an affidavit of merits is necessary only where the party asks for a stay of the proceedings until the return of the commission. *Warner v. Harvey*, 9 Wen. 444; *Meech v. Calkins*, 4 Wen. 534.

The party moving for a commission names all the commissioners unless cause is shown. *Harris v. Wilson*, 2 Wen. 627.

Under a commission to take testimony, the depositions of witnesses will be received in evidence, although the oaths to the witnesses were not administered by the commissioners, if it appears that they were prohibited from administering them, and they were in fact administered by the local authorities. *Lincoln v. Battelle*, 6 Wen. 475.

If notice for commission be not given by a defendant, until after service of notice of trial, the defendant must pay the costs of the plaintiff's preparation for trial. *La Farge v. Luce*, 2 Wen. 242.

Exceptions to interrogatories, annexed to a commission to take the testimony of a witness, proposed in the progress of a cause, may be taken when the answers are offered in evidence. (8 Cow. 416, contra.) *Ocean Ins. Co. v. Francis*, 2 Wen. 64.

Where there was a stipulation between the attorneys that either party

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might receive the return of commissioners authorized to take testimony, duly sealed, and deliver it to the clerk, which was done; held, no objection to the reading of the testimony, that the direction on the return did not specify the clerk's residence, as required by 2 R. S. 394, s. 16, subd. 4. *Williams v. Eldridge*, 1 Hill, 249.

The deposition in this case was held properly read in evidence, though it did not appear that a copy of s. 16 of said statute had been annexed to the commission. *Ib.*

If annexing a copy of that section were essential, the court it seems would intend it to have been done, unless the contrary were shown. *Ib.*

It will be presumed that the commissioner, who took the testimony, closed and sealed the package himself. *Ib.*

Where a defendant gives notice of his intention to apply for a commission to examine witnesses, after he has received notice of trial, he will not be compelled to pay the costs of preparing for trial, if he had used due diligence. *Jones v. Ives*, 1 Wen. 283.

On motion for a commission, the affidavit must state that the party has a defence on the merits. *Brisban ads. Hoyt*, 1 Wen. 27; *Meech v. Calkins*, 4 Hill, 534.

Where a criminal cause is removed by certiorari into the supreme court, and retained on the civil side, a commission may issue to take the deposition of a foreign witness, as in a civil cause. *The People v. Vermilyea*, 7 Cow. 369; and see 2 R. S. 731, s. 773.

After issue joined upon an indictment, the defendant may examine witnesses residing out of the state, upon commission; and the public prosecutor is entitled to join in the commission, and name witnesses on the part of the people. *The People v. Restell, alias Lokman*, 3 Hill, 289.

A deed, or other exhibit, proved under a commission, must in general be annexed to and returned with the commission. *Jackson v. Shephard*, 6 Cow. 444.

But, where it is in the custody of the law, *e. g.*, being a deed of a military lot, deposited with the clerk of the county of Cayuga, and forming a part of the records of that county, annexing a copy is sufficient, and the exhibit may be produced on the trial, separate from the commission. *Ib.*

Answers to interrogatories upon a commission cannot be objected to at the trial as incompetent evidence, provided they are fairly within the scope of the interrogatories. *Francis v. The Ocean Ins. Co.*, 6 Cow. 404.

The proper time to object is when the interrogatories are settled. *Ib.*

But the answers must be restrained in their effect to matters of fact; and cannot be received to establish a matter of law; as, where a master of a vessel answered that the voyage was fair and lawful, &c. This was held inadmissible, beyond showing the *bona fides* with which he acted. *Ib.*

Where one of the plaintiff's witnesses, examined under a commission, has refused to answer a material interrogatory put by the defendant, the latter may insist that the whole deposition shall be rejected. *Smith v. Griffith*, 3 Hill, 333.

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To entitle the exemplifications of a commission and depositions to be read in evidence, there must be an accompanying certificate of a judge or other officer, authorized by the statute (1 R. L. 520, s. 11) to receive and open commissions. *Oneyda Manufacturing Society v. Lawrence*, 4 Cow. 440; *Jackson v. Hobby*, 2 J. R. 357.

The interrogatories under a commission to examine witnesses, issued pursuant to the act, (sess. 36, ch. 56, s. 11; 1 R. L., 519, 520,) may be signed by counsel, without the addition of his character to the signature; it is enough that he is in truth a counsellor. *Homer v. Martin*, 6 Cow. 156.

A judge of the C. P. of the degree of counsel in the supreme court, may direct as to the return of a commission within the act, (sess. 45, ch. 217, s. 2,) *Ib.*

So, the first judge of the C. P. of New York. *Ib.*

Form of the direction. *Ib.*

A direction to return the commission by mail, directed to one of the clerks of the supreme court, is complied with, if the commission be delivered from the post-office to the clerk by any of the ordinary means: as, by a messenger, the penny-post, &c. Nor is it any objection that it be delivered by the attorney for one of the parties. The true question is, was it delivered to the clerk in an unaltered state? If the court be satisfied there has been no abuse, it may be received in evidence. *Ib.*

It is not necessary that the depositions be placed in the post-office immediately after they are taken. *Hallerman v. Field*, 23 Wen. 38.

That the papers composing the return are connected by wafers only, is not an objection to the deposition being read. *Williams v. Eldridge*, 1 Hill, 249.

It need not appear, by the return to a commission, that the oath was publicly administered to the witness; as that will be presumed to have been regularly done. *Ib.*

A commissioner to take testimony is *quoad hoc* an officer to the court in which the proceeding is pending; and his signature, like that of the clerk to an office copy, will be judicially noticed, though his name be not written at length. *Ib.*

On the same principle, the court will presume that the commissioner discharged his duty, by doing all those things in the execution of the commission which he is not bound specifically to certify as done. *Ib.*

It is no objection to receiving in evidence depositions taken on commission that the officer's direction of the manner in which the commission should be returned was indorsed on the interrogatories annexed, instead of being indorsed on the commission itself. *Hurd v. Pendrigh*, 2 Hill, 502.

An affidavit for a commission is sufficient, if it show the witness to be material, as advised, &c., and that he is out of the jurisdiction of the court. *Bracket v. Dudley*, 1 Cow. 209.

It need not add that the party cannot safely proceed to trial without such evidence. *Ib.*

The affidavit of an agent or attorney, in fact, is sufficient to move for a

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commission upon, without showing an excuse for its not being made by the party himself. *Murray v. Kirkpatrick*, 1 Cow. 210.

Depositions of a witness residing abroad, taken under a commission, were read on the trial of a cause, and the jury, not being able to agree in a verdict, were discharged, and a second commission to re-examine the same witness was allowed to be issued. *Fisher v. Dale*, 17 J. R., 343.

In the return, the commissioners should certify that they caused the witness to be examined on oath, upon the interrogatories annexed, and that they caused the examination to be reduced to writing; if this be wanting, the depositions cannot be read. *Baile v. Cochran*, 2 J. R., 417.

The return to a commission, stated in the caption to the deposition, that the witness was sworn and examined by virtue of the commission, and at the bottom of the deposition the commissioners had signed their names, *qua* commissioners; this is sufficient, and it will be intended that the witness was sworn and examined by the commissioners, and that the deposition was reduced to writing by them, or under their direction. *Bolte v. Van Rosten*, 4 J. R. 130.

A commission issued to take the examination of witnesses residing abroad, must be returned and delivered to a judge of the court, and actually filed in the clerk's office, before the depositions can be read in evidence. *Jackson ad dem. Parker v. Hobby*, 20 J. R. 357.

Where a commission was returned and delivered by the agent to a judge at nisi prius, who took his affidavit as to the manner of receiving it, after the cause was called, but before the trial was commenced; held, that the depositions annexed to the commission so opened by the judge, were not legal evidence. *Ib.*

Where several objections were made to the reading of a deposition, which the court, after taking time to deliberate, overruled; held, that they had no right to preclude the party from raising other objections afterward. *Williams v. Eldridge*, 1 Hill, 249.

The objection to an interrogatory, annexed to a commission, on the ground of its being leading, may be made when the answer of the witness is proposed to be read in evidence; especially, when the interrogatories are annexed under a stipulation, expressly saving all legal exceptions. *Ib.*

When a commission is directed to two, either or both of whom, being authorized thereby to execute it, and the return is signed by only one of them, it will be presumed that he alone was present at its execution, though the words, "by virtue of a commission to us directed," appear in the caption of the return. *Ib.*

It is not a ground of error, it seems, that the court at the trial allowed a leading question to be put by a party to his own witness, as that is matter resting in discretion; otherwise, in respect to answers to leading interrogatories annexed to a deposition. If these are objected to on that ground, the court are bound to exclude them. *Ib.*

Under the last general interrogatory annexed to a commission to take the examination of witnesses abroad, the witness in his answer, may state facts

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not drawn forth by the previous particular interrogatories. *Percival v. Halsey*, 18 J. R. 257.

A motion for a commission to examine witnesses will not be entertained, after a similar application to a circuit judge, and a refusal by him. *Allen v. Gibbs*, 12 Wen. 202.

A commission to examine witnesses, will stay, &c., will issue, notwithstanding application is not made until fourth special term after issue joined. *Beall v. Day*, 7 Wen. 513.

An attorney may swear to the materiality of witnesses, without adding as advised by counsel. *Ib.*

On a motion for commission to examine witnesses, when doubt is cast upon the good faith of the application, the commission will not be granted on the common affidavit. If, however, at a subsequent term, a *prima facie* case is made out, the motion will be granted. *Rogers v. Rogers*, 7 Wen. 514.

A commission may issue to take the testimony of a witness residing out of the state, though his domicile is here. *Pooler v. Maples*, 1 Wen. 65.

A commission to take testimony may be sued out previous to default or issue. *Oskidene v. Hills*, 1 Wen. 18.

Where a party, upon an affidavit, sets forth the facts which he wishes to establish under a commission to a foreign country, and shows that those facts can only be proved by persons in the employment of his antagonist, whose names are unknown to him, the court will either permit the commission to issue generally without the names of the witnesses, or grant a stay of proceeding until their names can be ascertained. *Shaffer v. Wilcox*, 2 H. 501.

The court will not refuse the commission, though the opposite party makes affidavit that the witnesses named are interested, but will leave the question of their competency to be determined at the trial of the cause. *Graves v. Delaplaine*, 11 J. R. 200.

Where a motion was opposed on an affidavit made by one who had refused to testify for the moving party, the court denied the latter a commission to compel the witness to be examined pursuant to 2 R. S. 457, § 8, s. 24, 25, 2d. ed., on the ground that the affidavit was full to the merits of the motion, and showed that a further examination would be useless. *Ryers v. Hedges*, 1 Hill, 646.

And, a commission will be denied under such circumstances, if the adverse party produce the witness' affidavit touching the matters in question; for it will be presumed, that he has told the whole truth, till the contrary appear. *Ib.*

A commission will be granted, to examine an officer in the army of the United States, on an affidavit of his being a material witness, and expected to be ordered away. *Cardall v. Wilcox*, 9 J. R. 266.

The granting a commission rests in the sound discretion of the court, and is not always a matter of course, on the general affidavit. *Vanderwort v. Columbian Insurance Company*, 3 J. C. 157.

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Where the opposite party can show sufficient to render the propriety of issuing the commission doubtful, the court will require the party moving to show the particular object of the commission, the evidence he wants to obtain, and in what manner it is material. *Ib.*

If the witness, to examine whom the commission was issued, should die, the court will not allow a new name to be inserted; but the party may issue a new commission, not, however, to be a stay of proceedings. *M'Vickar v. Woolcot*, 3 Cal. R. 321.

Where a witness, under a commission, has disclosed some new fact, a second commission will be granted to inquire into it; but it must be at the peril of the party applying. *Nichol v. Columbian Insurance Company*, 1 Cal. R. 345.

Where the defendant intends to sue out a commission, he should give notice of it before he receives a notice of trial, or within reasonable time after issue is joined, according to the circumstances of the case; and such notice will stay the proceedings. *Burr v. Skinner*, 1 J. C. 391. S. C., C. C. 97.

If the defendant does not apply, until he receives notice of trial, he must pay the costs of the notice for trial. *Ib.*

It is not enough to state in the affidavit, that it is supposed sufficient evidence might be obtain in the place to which the commission is intended to be issued, but it must show that material evidence does not exist there. *Franklin v. United Insurance Company*, 2 J. C. 68.

The affidavit may be made by a person not a party to the suit. *Demar v. Van Zandt*, 2 J. C. 69.

An affidavit of a plaintiff in a cause, residing at Havanna, taken before the commercial and naval agent of the United States, resident there, may be read, on a motion for a commission. *Welsh v. Hill, junr.*, 2 J. R. 373.

The affidavit must state, that the cause is at issue, or special circumstances, to induce the court to grant a commission before issue joined. *Hackley v. Patrick*, 2 J. R. 478. *Jackson, ex dem. Atkins v. Bancroft*, 3 J. R. 259. *Anonymous*, 2 Cal. R. 259. *Allen v. Hendree*, 6 Cow. 400.

A commission to examine witnesses out of this state, may be directed to persons residing within it. *Jackson ex dem. Lewis v. Van Loon*, 3 Cal. R. 105.

Where the commissioners are named in the notice of motion, the opposite party should object to them at the time; it is too late to do so at the time the motion is made. *Townsend v. New York Insurance Company*, 1 Cal. R. 4.

Objections to commissioners named to take the examination of witnesses abroad, will not be received upon mere suggestions, but there must be an affidavit of the grounds of objection. *Biays v. Merrihue*, 3 J. R. 251.

A commission cannot be applied for without notice. *Watson v. Delafield*, 2 Cal. R. 260.

Where a witness resides in a neighboring state, from whence a commission might be returned in a few days, if his testimony *de bene esse* is taken under an order of a judge with such precipitancy as not to afford the opposite

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party time for his cross-examination, it will not be allowed to be read at the trial. *Sandford v. Burrell*, Anth. N. P. 184.

A rule or order for a commission to examine witnesses does not operate, *per se*, as a stay of proceedings; if it is intended so to operate, the court or judge will so direct. *Maynard v. Chapin*, 7 Wen. 520.

Where a defendant gives notice of his intention to apply for a commission to examine witnesses, within a reasonable time (according to the circumstances of the case) after issue is joined, though not before he has received notice of trial, he will not be compelled to pay the costs of preparing for trial. *Jes. ad. Jones*, 1 Wen. 283.

Where the rule for a commission is obtained after the expiration of four days in term after issue joined, it does not stay the proceedings, unless the court expressly direct that it is to have that effect. *Jackson ex dem. Wadsworth v. Woodworth*, 18 J. R. 135.

But if the commission is obtained within the four days, it stays the proceedings of course, though nothing is said in the rule as to its effect. *Ib.*

It is, therefore, unnecessary to state, in the rule, whether it is to operate as a stay of proceedings, or not, unless by special direction of the court, on application for that purpose. *Ib.*

Where a commission to examine witnesses in France had been issued, on the part of the defendant, in May, 1805, and not returned in February, 1807, the court allowed the plaintiff to proceed to trial, no satisfactory cause being shown to the court for the delay of the return. *Bouchereau v. Le Guen*, 2 J. R. 196.

And an affidavit of the defendant's counsel, that he believes that the return is delayed by the acts of the plaintiff, will not be sufficient to prevent him from proceeding to trial. *Ib.*

A plaintiff who issued a commission, not having proceeded to trial, was permitted to stipulate anew, on an affidavit, stating the commission to have been mislaid by the defendant's commissioner, to have been found, and shortly expected to be returned. *Coles v. Thomson*, 2 Cal. R. 47.

The plaintiff will have leave to notice his cause for trial, although a commission has not been returned, and the time for returning it not expired; but the defendant will not thereby be prevented from showing cause for the postponement of the trial. *Pell v. Bunker*, 2 Cal. R. 46.

After a second commission issued, with leave to go to trial, notwithstanding, on the defendant's showing that the testimony of the witness to be examined, was almost conclusive on the question, and that the commission had been sent without a knowledge of the exact spot where the witness was, the rule for permitting the plaintiff to go to trial was vacated, and time allowed for the return of the commission. *Ferris v. Smith*, 2 Cal. R. 253.

Where both parties have joined in the commission, the court will not vacate it; but the plaintiff may have a rule to proceed to trial, notwithstanding the commission. *Shuter v. Hallet*, 1 Cal. R. 115.

The plaintiff not having joined in the commission, and sufficient time having elapsed for the return of it, the rule was so far vacated as to permit him

 Anonymous

to proceed to trial, notwithstanding the commission. *Kirby v. Watkins*, 1 Cal. R. 503.

On a commission to England, after eight months without a return the court will permit the plaintiff to proceed to trial; but the defendant may, at the circuit, show cause for putting off the trial. *Ib.*

Three months are sufficient time for executing and returning a commission arrived in London. *Coles v. Thompson*, 1 Cal. R. 517.

The plaintiff issuing a commission, must show due diligence, or he must stipulate or be non-suited, as if no commission had issued. *Ib.*

That the commission may be a stay of proceedings, the affidavit must state positively, that the party has a defence on merits, and that he seeks only the requisite proof. *Franklin v. The United Insurance Company*, 2 J. C. 285.

When a commission is returned, although the return may be irregular it ceases to be any longer a stay of proceedings. *Rush v. Cobbet*, 2 J. C. 70.

When a rule for a commission has been obtained, it suspends the cause till on an application to the court, a vacatur is ordered, or leave obtained to proceed to trial. *Brain v. Rodelice*, 1 Cal. R. 73.

But if the plaintiff, notwithstanding, bring on the cause, and the defendant appears and examines witnesses, it is a waiver on the commission, and the vacatur is unnecessary. *Ib.* 1 N. Y. Dig., p. 459. *et seq.*

 ANONYMOUS.

The court will not grant a rule on a justice, ordering him to return the conduct of the jury.

THE application was for a rule ordering a justice to return certain parts of the conduct of the jury, which, it was said, amounted to misbehavior.

Per Curiam. The justice is not answerable for this, nor was it a matter before him. We cannot order him to return that over which he had no judicial control, and which was never submitted to him.

 Radcliff v. Marine Ins. Co.

RADCLIFF and DAVIS against THE MARINE INSURANCE COMPANY.

Practice as to orders for staying proceedings.

THESE points were ruled: 1. A judge may grant and annul his own order to stay proceedings on a case made, as well in term as in vacation, and this, though a rule for judgment be entered; the decision in *Shephard ads. Case*, Cole. 90, applying to judgments perfected; 2. If a judge has granted an order to stay proceedings on a case made, on account of an improper *item* allowed by a jury, and he declare this to have been his only reason, the court may, on such *item* being relinquished, vacate the order.(a)

BIRD, SAVAGE and BIRD against PIERPOINT.

Though the sum for which a verdict is rendered be due, the court will not, after a case made, and an order to stay proceedings, permit judgment to be entered up for the purpose of binding the lands of the defendant.

A CASE having being made, after a verdict in this cause for a very considerable sum, the justice of the demand to which was not so much questioned as whether it should be paid to the plaintiffs, or the assignee of one of them.

Radcliff, on an affidavit showing that the debt was actually due, moved for liberty to enter up judgment, in order to bind the lands of the defendant.

(a) So on an application for a new trial, where the jury had allowed against the defendant one charge to which he was not liable, on the plaintiff's attorney agreeing to relinquish such charge, the motion was refused. *Hanks v. Stacey*, 8 D. & R. 573.

Bird v. Pierpoint.

Riggs and *Hoffman*, contra. It is only by statute that real estate is subjected to judgments. The present application is for the court to make a new law, and [*107] render it liable for verdicts. *Admitting the debt to be due to one man, it is no reason for giving a judgment to another. It may as well be asked on suing out the writ. It is, in effect, requiring the court to decide that the defendant should give a mortgage, before it is determined the plaintiff has any right. The real creditor may be satisfied with personal security, or without any.

Benson, in reply, urged the possible lapse of time before a decision, and that granting the motion would be of no inconvenience, as it did not take any thing out of the pocket of the defendant; and this consideration would sufficiently distinguish this case from those where it was asked to order the amount of the verdict to be brought into court in money.

Per Curiam. We are all of opinion that you can take nothing by your motion. There would be no limitation to this kind of practice. It would be asked in every cause, and in every stage. A verdict is no evidence of right; in many cases no more than filing the declaration. To the country at large such a principle would operate very injuriously. In the English courts such a measure has never been attempted, though, from the practice of directing, in important cases, two and even three arguments, the delay must sometimes be very great. It is a mere matter of possibility where the justice of the case is. To make a rule here, we must do so in all cases, and the result would be, that wherever there was a certificate to stay proceedings, it would be followed by a judgment. The plaintiffs show no right to the debt, though it may be due, and as to the sum, 100 dollars to some persons are of as much

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importance as 1,000 dollars to others. We therefore deny the application, with costs for resisting.(a)

Motion denied.

GILES *against* CAINES.

An irregularity not known, is not waived by a subsequent step taken by the opposite party, who may enter a default on the former irregularity if done so soon as known. Though the rule is, that an application to set aside a default comes too late if the judgment on it be perfected, yet, on a strong case of merits, it may be done on payment of costs, if the irregularity be merely the want of filing a paper served.

AFTER noticing for trial, it was discovered that the defendant's attorney had not filed the plea, a copy of which he had delivered; the plaintiff, therefore, entered a default as for want of a plea. To set aside this, the defendant noticed for the first day of term, but having obtained no order to stay proceedings, and not bringing on the motion upon that day, the plaintiff duly executed a writ of inquiry. On these facts, and a strong affidavit of a good and substantial defence upon the merits,

Caines moved to set aside the default and all subsequent proceedings. *There was a distinction to [*108] be taken, he said, between the circumstances here, and those in *Shephard* ads. *Case*, Cole. 90. There, the plaintiff had done no act to waive the default, and therefore, as it stood in full force, his perfecting his judgment afterwards was regular; but in the present instance, he had, by joining issue and noticing for trial, waived the mere form of filing the plea, and had no default on which to rest. He had himself knocked away the foundation on which he stood. As to the want of filing the plea, that

(a) See *Vandyck v. Van Beuren and Vosburgh*, 1 Caines' Rep. 13.

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was a mere form, and the court would order it to be done on the suggestion of the plaintiff himself. *Cohan* ad. *Kip*, *Cole*. 45.

Evertson, contra. This is not to be distinguished from *Shephard* ad. *Case*. The plaintiff could not waive that which he did not know.

Per Curiam. The omission of filing the plea(a) not being known when issue was joined, or the cause noticed, cannot be cured by those acts. The principle, therefore, of *Shephard* ad. *Case*, applies. Though there is a strong affidavit of merits, we can relieve only on terms; those must be payment of costs, and filing the plea *instante*.

Motion granted.

NEILSON and others *against* THE COLUMBIAN INSURANCE COMPANY.(b)

If the articles contained in the memorandum in a policy respecting corn, &c., physically exist, the underwriter is not liable for a total loss on account of their being perfectly rotten. When the assured rests on a loss of voyage, to warrant his recovery, he should show it most clearly, and of this a survey is always a proof of good faith. The point ought also to be specifically submitted to the jury.

UPON a policy on two thousand three hundred bushels of corn, from New-York to Madeira, with the usual memorandum excluding grain, &c., from average, unless general, effected on account of Joaquim de Barros, a Portuguese, resident at Bonavista, and master of the vessel in which laden.

(a) See *Smith v. Wells*, 6 Johns. Rep. 286, contra the principle of the decision in the text.

(b) See this case on a new trial, 1 Johns. Rep. 801.

The ship, after a passage of more than 40 days, in which she was under the necessity of throwing overboard 500 bushels of her cargo, arrived at the north side of the island, where she was obliged to come to, as a southerly wind then blowing rendered it impossible to go round to the harbor of Funchal. While thus at anchor, a vessel hove in sight, from whose manœuvres imagining her a privateer or pirate, they weighed and stood to the eastward, the strange sail following the same course. During the night they lost sight of her, but whilst keeping on they concluded, from the state of the vessel and crew, in consequence of the bad weather they had experienced, to run for the Cape de Verdes, as they *were in [*109] want of water, and might fall in with the privateer in attempting to regain their port of destination, which, even after making it, they would be unable, from the continuance of the south wind, to enter. In two days from the making this determination, they fell in with the trade winds, and in 9 or 10 after putting about for the Cape de Verdes, reached Bonavista, where, upon opening the hatches, the corn was found so damaged and offensive, that it was forbidden to be landed, but was sold, as it lay on board, for about 400 dollars. Here they remained 30 days, and received some partial supplies from other vessels; but not having it in their power to procure materials, or workmen, to repair the sea-damage sustained on the voyage, the captain sailed for Bravo to refit. This island, however, he was unable to fetch, and therefore made for St. Vincent's, another of the Cape de Verdes, at which he repaired the residue of the injuries his ship had suffered in her quarterboards and seams, and from the loss of her main and jib-boom. This being accomplished, the vessel sailed on a voyage to Lisbon, and no claim was ever made against the underwriter on her.

It was in evidence, that with a south wind the assured might, in 8 or 4 days after leaving Maderia, have reached Lisbon, or Mogadore; that in going to Bonavista she must

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have passed the Canaries; that at either of these places she might have been repaired, and that the winds at Madeira and along the coast to the Cape de Verda, were as variable as at New York. The testimony, however, against this was, that after falling in with the trade winds, it was impossible to reach Lisbon; that the supposition of a war between Spain and Portugal prevented touching at the Canaries, and the constant hostilities between the Moors and Portuguese forbade the going to Mogadore.

Upon this evidence the judge charged, that if, on reaching its port of destination, the grain was "of no value as nutriment for man," it made the loss total. But, that he left it to them to determine whether the vessel could, or ought to have gone to any port nearer than Bonavista, where she might have been repaired; that if this could have been done, and the vessel had afterwards arrived at Madeira, the loss would have been a general average only.

The jury found a verdict for a total loss, to set aside which the defendants now applied, for misdirection, and as being contrary to evidence.

[*110] **Bogert*, in support of the motion. Under the clause contained in the policy, the insurers were protected from all average losses, except such as might be general. For the decay of those articles, specified in the memorandum, the underwriter is never liable: were he to be so, a deterioration to half the value would be cause of abandonment; a proposition that is not to be maintained. Nothing short of the annihilation of the subject matter can make the loss total, and it is immaterial whether the commodity be at a port of necessity, or that of its destination. *Cocking v. Fraser*, Park, 114. But, without recurring to the English authorities, the decision in this court, in *Maggrath and Higgins v. J. B. Church*, 1 Caines' Rep. 196, is in point. To capacitate the assured to recover, except for an average loss, it must be shown that the voyage was defeated by the vessel's not being in a condition to

proceed. The case ought to have been submitted on this alone; and then, we say, the evidence will not support the verdict. The whole tenor of the master's conduct shows an endeavor to create a pretext for defeating the voyage, that he might claim a total loss.

T. L. Ogden and Hoffman, contra. We admit that no intrinsic damage will warrant a claim on the underwriter. But if the voyage be defeated, then, whether the article be perfectly sound, or perfectly rotten, he is liable. It was certainly justifiable to leave Madeira on sight of a vessel apparently hostile. On the third day after this, the trade winds were fallen in with, and rendered it impossible to do otherwise than bear away. This, and the other circumstances, excuse the not going to any place nearer than Bonavista. The impossibility of repairs there defeated the voyage; it was there broken up, and the cargo sold. That the vessel was afterwards made fit for sea is no argument against this conclusion; for if it be allowed, nothing short of the destruction of the ship would be a loss of voyage. A reparation at any indefinite period of time would be a bar to a recovery.

Pendleton, in reply, was stopped by the court.

Per Curiam. A new trial must be awarded with costs to abide the event of the suit. The charge of the judge, as stated in the case, was clearly wrong. So long as the corn physically existed, there could not be a total loss.^(a) Though good for nothing, the defendants were not liable,

(a) That is, if the voyage could have been prosecuted, and the destruction of the corn had not proceeded from a peril insured against; for, if it has, or if the voyage cannot, in consequence of perils within the policy, be prosecuted by the vessel laden with the subject of the policy, and no other can be procured to forward it, a recovery may be had as for a total loss. *Wilson v. Royal Exch. Ass. Co.*, 3 Camp. 623; *Manning v. Newnham*, there cited; *Dyson v. Boscroft*, 3 Bosc. & Pull. 474; *Schieffelin v. New York Ins. Co.*, 9 Johns. Rep. 21.

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being protected by the clause in the memorandum.(a) The direction was contrary to our determination in *Maggrath and Higgins v. Church*. It ought also to have [*111] been *left to the jury, as a material point, whether the vessel could not have been repaired at the Cape de Verd Islands, so as to perform her voyage. This does not appear to have been distinctly submitted.

LIVINGSTON, J. I think when the underwritten wishes

(a) In England, it has been ruled, that, under the word "corn" in the memorandum, peas, beans, and malt are included *Mason v. Skurray*, Park. 149. The reason seems to be, that, according to the English acceptance, corn is *nomen generalissimum*. It is the *genus* and as *omne majus in se continet minus*; so, other articles of the same *genus*, though not specified, and of a different species, are protected, because they come within the general description of articles "perishable in their own nature" within the *genus* enumerated. But rice, though perishable in its own nature, is not protected by the same word, (*Scott v. Bourdillon*, 2 N. R., 213,) because it is not, according to the common acceptance of the word "corn," in England, deemed to fall within its meaning. It is, therefore, presumed that, in the courts in Westminster Hall, the words "perishable in their own nature" apply to articles *eiusdem generis*. With us, those articles "perishable in their own nature," being of the same kind as those enumerated in the memorandum, are not within it, for *expressio unius est exclusio alterius*. Therefore, within "dried" fish, "pickled" is not included. *Baker v. Ludlow*, July, 1801, MS., Kent, Ch. J. The description, "perishable in their own nature," appears to apply to such other articles not of the same kind or quality as those enumerated, or to nothing. This determination seems to have been made without a due regard to the application of the principle on which it was decided, and without advertent to the restriction of general words to antecedent particular terms. As, if a man were to covenant to indemnify another for taking possession of a piece of land, from "all ejections, trespasses, and other actions," it would not reach to actions of assault and battery, but be restricted to actions *eiusdem generis*. So, it is presumed that the words "all other articles perishable in their own nature," ought to apply to all articles of the same *genus* as those enumerated, which are perishable in their own nature. But, as no interpretation can extend the memorandum to articles not perishable in their own nature, by the word "roots," lately introduced in the American policies, "sarsaparilla," which is not perishable in its own nature, cannot be intended. *Cott and Pierpoint v. Com. Ins. Co.*, 7 Johns. Rep. 385. Under the word "salt" saltpetre is not, *causa quæ supra*, included. It is supposed that, as "corn" has with us a designated and specific acceptance, it will not be extended to wheat, rye, barley, oats, beans, peas, or malt.

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a jury to find for him, on account of a loss of voyage from the vessel's not being able to reach her port, or for want of repairs, it ought to be very fully shown. There was no survey in this case; and though I do not say that fact is absolutely necessary, yet it is always a circumstance evincive of good faith.[1]

New trial.

[1] In an action on a marine policy, the judge tells the jury that, in case the loss arose from "want of ordinary prudence in the navigation of the vessel," they should find for the underwriters; this will be regarded as equivalent to submitting the question whether the loss arose either from ignorance or ordinary neglect. *Keefer v. The Fireman's Ins. Co. of the city of Albany*, 3 Hill, 250.

A vessel was insured, and warranted "free from any loss by the British or Americans; but, in case of capture by either, the usual sea risks to continue." The vessel was captured by the British, and, while detained by the captors, was lost in consequence of their negligence; held, that if the loss had arisen from a sea risk, strictly speaking, the insurer would have been liable; but, as the immediate and proximate cause of the loss was an act of the captors, and which, if done by the insured, would have exonerated the insurers, the latter was, in this case, protected by the warranty. *Coolidge v. New York Firemen Ins. Co.*, 14 J. R. 308.

The policy contained a clause, that the insurers took no risk in port, but sea risk; the vessel, while in port, was driven on shore and stranded, so that she could not be got off, unless at an expense exceeding half her value, and was taken possession of by an armed force, and burnt; held, that it was a loss by sea risk, and not by burning. *Patrick v. Commercial Ins. Co.*, 11 J. R. 9.

But, there being no evidence that the cargo had been injured by the stranding, held, that the loss of that was not occasioned by sea risk, but was to be attributed solely to the subsequent burning. *Ib.*, 11 J. R., 14.

Where the policy enumerated dried fish in the memorandum, among the articles free from average, unless general, as also, "all other articles perishable in their own nature," pickled fish are not included, and the plaintiff may recover for an average loss on them. *Baker v. Ludlow*, 2 J. C., 289.

Where a vessel, during a voyage, puts into a port of necessity, and is repaired, and afterward proceeds on her voyage, and is totally lost, the insured is entitled to recover the partial loss arising from the repairs and general average consequent thereon, in addition to the total loss. *Saltus v. Commercial Ins. Co.*, 10 J. R. 487.

There is no precise time, after which, a vessel that has not been heard of is to be presumed lost, but it must depend on the circumstances of the case. *Gordon v. Bowne*, 2 J. R., 150.

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A vessel bound from North Carolina to New York, and not heard of for a year, will be presumed to be lost. *Ib.*

In judging whether a missing vessel has been lost on the voyage insured, the usual and not the utmost period of the voyage is to be taken into calculation. *Brown v. Neilson*, 1 Cal. R., 525.

If two storms are given in evidence, in an action on a policy for a limited time, the one storm within, and the other without the time, it is for the jury to decide in which the loss happened. *Ib.*

An insurance made after a knowledge of a second storm does not conclude the jury from finding the vessel was lost in a prior storm. *Ib.*

Where a vessel, chartered at so much per month, is detained by an embargo, the charterer who has had the cargo insured, cannot recover, from the insurer, the hire paid for the vessel during her detention. *Penny v. New York Ins. Co.*, 3 Cal. R., 155.

The capture of a vessel under a convoy, by the commander of the convoy, for the purpose of protecting her from belligerent capture, will not exonerate the insurer, in case of loss. *Gouverneur v. United Insurance Company*, 1 Cal. R. 592.

Insurance on goods, from New York to Gaudaloupe: the vessel was captured by a British cruiser, carried into Antigua, and libelled: the master put in a claim, and the goods were detained for further proof, but were delivered to the master, on his giving security for their appraised value, and paying the costs. The master procured A., a merchant of Antigua, to give the security and also to pay costs and other expenses for the ship and cargo; and, for the indemnity of A., the master drew bills of exchange on his owner in New York, and pledged the ship and goods to A. to secure the amount, which included a commission of five per cent, charged by A. on the sum advanced by him, and a premium of insurance, paid by him, to insure the ship and cargo, so pledged, from Antigua to New York. The cargo was delivered to the agent of A. in New York; and the insured, to obtain possession of his property, paid his proportion of the charges and expenses, including the commissions and premium of insurance; held, that the master having acted with good faith, and the charges being reasonable and necessary, the insured were entitled to recover the amount so paid against the insurers. *Pontaine v. Columbian Insurance Company*, 9 J. R. 28.

Where goods insured were captured during the voyage, and the vessel was released, but the goods detained for further proof, and were afterward restored on payment of the full freight, but the owner was obliged to hire another vessel to carry the goods to their place of destination; held, that the insured was liable to pay additional or increased freight, being an expense necessarily incurred in consequence of the capture. *Mumford v. Commercial Insurance Company*, 5 J. R. 262.

A cargo was insured from New York to Cherbourg in France, and the policy contained a clause, "warranted free from seizure for or on account of any illicit or prohibited trade." The vessel met with an English cruiser, and

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was compelled to go into the outer road to Plymouth, where she was detained six hours, and then suffered to proceed; but no person belonging to the vessel went on shore during the time of her detention. The vessel and cargo arrived at Cherbourg, and were there seized under the Berlin decree, and confiscated, on the alleged ground that the captain, on his examination by one of the officers of the port, had made a false declaration, that he had not been in England; held, that this was not a loss arising from any illicit or prohibited trade, but under the general peril of arrests and detentions of princes, and that the insurers were liable. *Mumford v. Phoenix Insurance Company*, 7 J. R. 449.

Where an American vessel sailed from Gottenburgh, bound to St. Petersburg, the next day after a British convoy, and came up with the convoy the next day after, and kept company with her through the Belt, but without receiving or exchanging any signals or receiving any assistance from the convoy, and without altering its course or retarding its voyage on account of the convoy, this was not considered as sailing under British convoy, so as to affect the right of the insured to recover for a total loss, in consequence of the capture by the French, though the ground of the condemnation was stated to be, her having sailed under British convoy. *Lawrence v. Ocean Ins. Co.*, 11 J. R. 241.

After capture and re-capture, the insured is liable only for the salvage and for losses within the policy, but not for expenses attending a sale of the property at auction, by direction of the consignee of the insured. *Muir v. United Ins. Co.*, 1 Cal. R. 49.

The insurer is liable for the expenses of prosecuting an appeal against captors, where he has notice of the proceedings, and does not dissent. *Lawrence v. Van Horn*, 1 Cal. R. 276.

Though the expenses surpass the amount of the underwriter's subscription. *Ib.*

As to the propriety of those expenses, and what proportion of them shall be paid by the insurer, the jury must decide. *Ib.*

Insurance on horses, "against all risks, including the risk of death, from any cause whatever, until they shall be safely landed;" in consequence of a storm, a horse is injured, which occasions his death three days after he is landed at the port of destination; this is within the risk insured against, and the insured is entitled to recover the full value of the horse. *Cott v. Smith*, 3 J. C. 16.

A vessel was captured and deprived of all her papers, which she never regained, and was afterward recaptured and restored, on payment of salvage; held, that the insured was justified in breaking up the voyage, and that the ship by the loss of her papers, not being in a legal capacity to perform her voyage, there was a total loss by capture. *Post v. Phoenix Ins. Co.*, 10 J. R. 19.

Detention in port, on a suspicion of a breach of neutrality, is a loss within the policy. *Smith v. Steinbach*, 2 C. C. R. 153.

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So, when the detention is occasioned by pestilence in port. *Williams v. Smith*, 2 Cal. R. 1.

Insurance on freight from Riga to New York. The bulk of the cargo consisted of hemp, and the residue of manufactured goods and iron. The vessel sprung a leak, and put into Kinsale in distress, where, on a survey she was found incapable of prosecuting her voyage, unless repaired at an expense equal to her value; and the master, with the advice of the merchants and others at Kinsale, sold the hemp there, and shipped the residue of the cargo, in another vessel to New York, which, however, was not capable of taking more than one-third of the hemp, as there was no machinery to pack and stow it in the Russian mode; held, that the insured was entitled to recover for a total loss of the freight, it not appearing that the goods re-shipped for New York had reached there, or that any freight had been earned. *Salts v. Ocean Insurance Co.*, 12 J. R. 107.

Where the insurance was on the cargo from New York to Antwerp; and the ship was boarded by a British privateer, and carried into Portsmouth, (England,) but was released after a short detention; and when she arrived in F., an armed force was put on board and kept there until the arrival of the vessel at Antwerp; and the vessel when there, was not allowed to depart nor land her cargo. The French government, however, permitted the cargo to be landed on condition of its being deposited in the public stores, until the decision of the emperor in respect to it. The vessel, after a long delay, was sold by order of government; held, that the plaintiff was entitled to recover as for a total loss. *Gracie v. New York Insurance Co.*, 18 J. 161.

Where the policy was, at and from her port of lading in the province of Yucatan, to New York; and she was at A. in that province when she was lost; and it appearing that A. was one of the usual places for delivering and receiving cargoes, held, that the insured were entitled to recover for a total loss. *De Longuemere v. The Fireman Ins. Co.*, 10 J. R. 137.

A policy contained this clause, to wit: "the said freight hereby insured, carried or not carried," and a part only of the cargo was on board, when the loss happened; but as the freight was valued at the sum insured; carried or not carried, held, that the plaintiff was entitled to recover as for a total loss. *Ib.*

Where the plaintiff was owner of a vessel, cargo, and freight, and had them all fully insured, and the vessel being captured after the return voyage had commenced, he duly abandoned all the subjects to the respective insurers; held, that the plaintiff was entitled to recover as for a total loss, subject to a deduction of the small rateable freight, which did not pass with the abandonment of the ship, to be adjusted as settled in *Lenox v. U. Ins. Co.*, 1 J. C. 377. *Davy v. Hallett*, 3 Cal. R. 16.

The principle of the above decision is, that, at the time of the total loss, there was an inchoate right to a freight to the amount of the insurance. There was some freight earned when the capture took place; the amount was immaterial, because it was a valued policy; and such valuation is to be

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adhered to, notwithstanding events in the course of the voyage may render the loss even advantageous to the insured. *Ib.*

It is sufficient, if there be freight at risk, equal to the sum insured, when the loss happens, and that some freight has been already earned. *Ib.*

On a total loss on a policy on freight, the insured is entitled to the whole amount of the freight without any deduction for expenses, which the vessel would necessarily have been put to in case of her safe arrival. *Stevens v. Columbian Insurance Company*, 3 Cal. R. 43.

A policy of insurance on goods from Philadelphia to St. Sebastians, containing the following clause: "warranted not to abandon if detained or captured, if the property is released within six months after notice to assurers; no risk in port taken but sea risk." The vessel, when about two leagues from land and about four leagues from St. Sebastians, was boarded by an armed launch, and a prize master and eight men put on board who took the vessel into Port Passage, where she was compelled to perform quarantine for eight days, when her hatches were sealed by the French consul, and the master and supercargo ordered to St. Sebastians; and some time after a French pilot and crew were put on board, and the vessel sent to Beyonne, where the cargo was sequestered and afterward landed by order of the French government, and put in the public stores; held, that there was a total loss by capture, and not by seizure in port. *Dusal v. Commercial Insurance Co.*, 10 J. R. 278.

The neglect of a supercargo to put in a claim to a vessel captured for an alleged violation of navigation laws, does not affect the claim of the assured for a total loss. *Ocean Ins. Co. v. Francis*, 2 Wen. 64.

The rule that constitutes the loss of more than one-half the value of the subject insured, a total loss, is a positive one, originating in the convenience of having a determinate and precise test in all cases, which by its universality and uniformity, may render inquiries into minute objects rather calculated to perplex than to elucidate, unnecessary. *Smith v. Bell*, 2 O. C. R. 153.

A vessel must be damaged to the amount of half her value, or more, after deducting the one-third new for old, allowed the underwriter. The deduction is professedly made, on the principle that the value of the subject insured has been enhanced to that amount; and the doctrine of technical total loss is expressly founded on the position that the subject insured has been deteriorated more than one-half. *Ib.*

In such case, the loss is considered a constructive total loss. *Ib.*

After a vessel is repaired, and successfully pursuing her voyage, the assured cannot abandon as for a technical total loss. *Depaux v. Ocean Ins. Co.*, 5 Cow. 63. See *Dickey v. Amer. Ins. Co.*, 3 Wen. 658.

In this case, the bottomry was executed at Rotterdam, after the voyage had terminated, on account of the sugars sold at Halifax, and port charges at Rotterdam. *Ib.*

In case of a technical total loss of a vessel insured, if no freight *pro rata itineris* has been earned, or if the expense of sending on the cargo by

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another vessel will exceed a moiety of the freight agreed upon by the charter party, it is a technical total loss of the freight which will authorize the assured to abandon; a technical total loss of the vessel involves a loss of the freight. *The American Ins. Co. v. Center*, 4 Wen. 45.

The principle adopted by our own courts, however, appears to be, that there must be a total destruction of the whole article before a recovery against the assurer can be had. *Le Roy v. Gouverneur*, 1 J. C. 226.

Where there was a memorandum in a policy, that corn should be free from average, unless general; it was held, that the assurer is protected from every claim for a total loss where there has not been an actual physical destruction of the subject insured. *Ib. Guerlain v. Columbian Ins. Co.*, 7 J. R. 527. *Magrath v. Church*, 1 Cai. R. 196. *Nelson v. Columbian Ins. Co.*, 3 Cal. R. 108.

The extent of the injury is to be calculated with reference to the value of the ship before the disaster. Hence the application of the principle of deducting one-third from the estimated expense of full repairs, for the purpose of ascertaining whether she is injured to a moiety of her value. *Ib.*

It is a well settled rule of American insurance law, that if a vessel is damaged by any of the perils insured against, so that the necessary repairs to restore her to her former state and render her seaworthy will exceed three-fourths of her value before the disaster, the owner is not bound to repair, but may abandon as for a total loss. This is usually called an injury to more than half her value, because one third of the expense of repair is deducted, new for old. *Dickey v. American Ins. Co.*, 3 Wen. 658. *Affirming*, 5 C. 4 Cow. 222.

A report by the surveyor of a port into which a vessel has put in distress, that the repairs of a vessel would cost \$20,000, when the vessel itself was only valued at \$10,000, and proof that upon such report and the request of the master, the vessel was sold by order of a court of vice-admiralty, is sufficient evidence of a technical total loss, especially where the underwriters put their refusal to pay upon the other grounds. *Catlett v. Pacific Ins. Co.*, 1 Wen. 561.

And, where the voyage is broken up before the arrival of the vessel at the port of destination, and the cargo is abandoned by the assured, and the master delivers it to the supercargo, such delivery constitutes the supercargo the agent of the master, and the subsequent acts of the supercargo are to be considered as acts of the master, who, after the abandonment, is the agent of the underwriters. *Ib.*

When both parties belong to the same government, the act of the government is as much the act of one party as of the other, and each ought to be equally stopp'd from taking advantage of it, to the prejudice of the other. *McBride v. The Marine Ins. Co.*, 5 J. R. 299.

In a case arising out of the same embargo, the doctrine of the foregoing case was confirmed by the supreme court, and also by the court of errors. *Ogden v. New York Fire Ins. Co.*, 10 J. R. 177; 12 *Ib.*, 25; *Waldens v. The Phoenix Ins. Co.*, 5 J. R. 309.

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The provision in a policy of insurance that the risk is against total loss only, means an absolute, not a mere technical total loss, whether the policy be a wagering policy or not. *Buchanan v. The Ocean Ins. Co.*, 6 Cow. 318.

The general principle in cases on such exceptions and warranties, is, that the insurer is liable as for a total loss, when the subject matter is destroyed, or when the voyage is defeated and lost. *Nelson v. Columbian Ins. Co.*, 3 Cal. R. 108.

Where there was a valued policy on specific articles, part only of which being condemned, the master, to prevent an appeal with which he was threatened by the captors, agreed to give them \$5000; to pay which it became necessary to sell, of the merchandize insured, not only more than a moiety in quantity, but also in value. It was objected, that if the other cargo on board, which was not insured, be taken into calculation, the part sold will fall short of a moiety, and the loss be turned into a partial one; but it was held, this being an insurance on particular articles, the residue of the cargo was not to be brought in the computation. *Vandenheusel v. United Ins. Co.*, 1 J. R. 406.

If A., having one barrel of sugar, and a hundred hogsheads of the same article in one vessel, insure only the former, which is taken away by a pirate, or otherwise lost, he may recover the whole insurance, though the property remaining may be fifty times its value. *Ib.* 3 N. Y. Dig., p. 157, *et seq.*

 STAATS *against* THE EXECUTORS OF TEN EYCK.

Under a covenant of ownership, seisin, power to sell, and for peaceable enjoyment, if the vendee be evicted, he can recover only the value of the land at the time of the purchase, with interest for so long a time as he pays mesne profits, and the costs of the ejectment that may be brought against him, but not those of the action for mesne profits.

On the 7th of January, 1798, the testator, Barent Ten Eyck, by indenture of release, in consideration of £700, granted, bargained, and sold to the plaintiff, and one Dudley Walsh, in fee, two lots of ground in the city of Albany, covenanting, "That he, the grantor, was the true and lawful owner; that he was lawfully and rightfully seised, in his own right, of a good and indefeasible estate of inheritance in the premises; that he had full power to sell in fee-simple, and that the grantees should forever peaceably hold and

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enjoy the premises without the interruption or eviction of any person whatever, lawfully claiming the same." In the month of May following, Walsh, for a valuable consideration, conveyed his moiety of these lots to Staats, who, on the 30th of October, 1802, after due possession, by lease and release, granted one of them to Margaret Chim in fee, and covenanted to warrant and defend her in the peaceable possession thereof. In August, 1803, an ejectment was brought against Margaret Chim, in which a judgment was obtained for a moiety of the lot sold to her, execution sued out, and this followed by a recovery in an action for the mesne profits. The value of the lot, from the moiety of which Margaret Chim was thus evicted, was, at the time of the sale by Ten Eyck, £300, and that was the consideration paid for it. Margaret Chim, being thus evicted, brought her action against the plaintiff, and recovered for the moiety she had lost.

Upon these facts, which were submitted without argument, the following questions were raised for the determination of the court. 1st. Whether the plaintiff was entitled, under the covenants in Ten Eyck's release, to recover [*112] cover any more than a moiety of the *consideration money paid for the lot from which Margaret Chim was evicted? 2d. Whether the interest of that consideration, and the increased value of the premises from the date of the deed to Margaret Chim, ought to be added? 3d. Whether the plaintiff was entitled to any retribution for the costs and damages he had sustained by the eviction and recoveries before mentioned?

KENT, Ch. J. This case resolves itself into these two points for inquiry: 1st. Whether, upon the covenants, the plaintiff be entitled to recover the value of the moiety of one lot at the time of eviction, or only at the time of the purchase, and to be ascertained by the consideration given? 2. If the latter be the rule of damages, then, whether

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the plaintiff be also entitled to recover interest upon the purchase-money, and the costs of the eviction?

1. There are two covenants contained in the deed; the one, that the testator was seised in fee, and had good right to convey; the other, that the grantee should hold the land free from any lawful disturbance or eviction. The present case does not state distinctly whether the eviction was founded upon an absolute title to a moiety of one lot, or upon some temporary encumbrance. But I conclude from the manner of stating the questions, and so I shall assume the fact to be, that the testator was not seised of the moiety so recovered when he made the conveyance, and had no right to convey it. The last covenant cannot, then, in this case, have any greater operation than the first, and I shall consider the question as if it depended upon the first covenant merely.

At common law, upon a writ of *warrantia chartæ*, the demandant recovered in compensation only the value for the land at the time of the warranty made, and although the land had become of increased value afterwards, by the discovery of a mine, or by buildings, or otherwise, yet the warrantor was not to render in value according to the then state of things, but as the land was when the warranty was made. Bro. Abr. tit. Voucher, pl. 69. Ibid. tit. Reconver in Value, pl. 59. 22 Vin. 144—146. Tb. pl. 1, 2, 9. Up. pl. 1, 2, 8. 1 Reeves' Eng. Law, 448. This recompense in value, on *excambium*, as it was anciently termed, consisted of lands of the warrantor, or which his heir inherited from him, of equal value with the land from which the feoffee was evicted. Glanville, l. 8, c. 4. Bracton, 884. a. b. That this was the ancient and uniform rule of the English law, is a point, as I apprehend, not to be questioned; *yet, in the early ages of the feudal [*118] law on the continent, as it appears, *Feudorum*, lib. 2, tit. 25, the lord was bound to recompense his vassal on eviction, with other lands equal to the value of the feud at the time of eviction; "*feudum restituit ejusdem*

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estimatiois quod erat tempore rei judicatae." But there is no evidence that this rule ever prevailed in England; nor do I find, in any case, that the law has been altered since the introduction of personal covenants, to the disuse of the ancient warranty. These covenants have been deemed preferable, because they secure a more easy, certain, and effectual recovery. But the change in the remedy did not affect the established measure of compensation, nor are we at liberty now to substitute a new rule of damages from mere speculative reasoning, and that, too, of doubtful solidity. In warranties upon the sale of chattels the law is the same as upon the sale of lands, and the buyer recovers back only the original price. 1 H. Black. 17. This is also the rule in Scotland, as to chattels. 1 Ersk. 206. Our law preserves, in all its branches, symmetry and harmony upon this subject. In the modern case of *Flureau v. Thornhill*, 2 Black. Rep. 1078, the court of K. B., laid down this doctrine, that upon a contract for a purchase of land, if the title prove bad, and the vendor is without fraud incapable of making a good one, the purchaser is not entitled to damages for the fancied goodness of his bargain. The return of the deposit money, with interest and costs, was all that was to be expected.

Upon the sale of lands the purchaser usually examines the titles for himself, and in case of good faith between the parties, (and of such cases only I now speak,) the seller discloses his proofs and knowledge of the title. The want of title is, therefore, usually a case of mutual error, and it would be ruinous and oppressive, to make the seller respond for any accidental or extraordinary rise in the value of the land. Still more burdensome would the rule seem to be if that rise was owing to the taste, fortune, or luxury of the purchaser. No man could venture to sell an acre of ground to a wealthy purchaser, without the hazard of absolute ruin. The hardship of this doctrine has been ably exposed by Lord Kaines in his examination of a decision in the Scotch law, that the vendor was bound to

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pay according to the increased value of the land. 1 Kaimes' Eq. 284—303. 1 Ersk. 206.

If the question was now *res integra*, and we are in search of a fit rule for the occasion, I know of none less exceptionable than the one already established. By the civil law the seller was *bound to restore the value [*114] of the subject at the time of eviction, but if the thing had been from any cause sunk below its original price, the seller was entitled to avail himself of this and pay no more than the thing was then worth; for the Roman law, with its usual and admirable equity, made the rule equal and impartial in its operation. It did not force the seller to bear the risk of the rise of the commodity without also taking his chance of its fall. Dig. lib. 21, tit. 2, l. 78. Ibid. l. 66, s. 3. Ibid. l. 64, s. 1. So far the rule in that law appeared at least clear and consistent but, with respect to beneficial improvements made by the purchaser, the decisions in the Code and Pandects are jarring and inconsistent with each other, and betray evident perplexity on this difficult question. Dig. lib. 19, tit. 1, 45, s. 1. Cod. lib. 8, tit. 45. l. q., and Perezius thereon. The more just opinion seems to be, that the claimant himself, and not the seller, ought to pay for them, for *nemo debet locupletari aliena jactura*, and this rule has, according to Lord Hardwicke, been several times adopted and applied by the English court of chancery. *East In. Com. v. Vincent*, 2 Atk. 38. While on this question, I hope it may not be deemed altogether impertinent to observe, that in the late digest of the Hindu law, compiled under the auspices of Sir William Jones, the question before us is stated and solved with a precision at least equal to that in the Roman code, and it is in exact conformity with the English law. On a sale declared void by the judge for want of ownership the seller is to pay the price to the buyer, and what price? asks the Hindu commentator. Is it the price actually received, or the present value of the thing? The answer is, the price for which it was

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sold; the price agreed on at the time of the sale, and received by the seller, and this price shall be recovered, although the value may have been diminished. 1 Colebrook's Digest, 478, 479. Before I conclude this head, I ought to observe, that in the present case it does not appear that any beneficial improvements have been made upon the premises since the purchase by the plaintiff, and although some of my observations have been more general than the precise facts in the case required, yet the opinion of the court is not intended to be given, or to reach beyond the case before us.

2. The next point arising in this case is, whether the plaintiff is entitled to recover interest upon the purchase-money, and the costs of eviction? It is evident, that originally the vendee recovered only what was [*115] deemed equivalent to the purchase-money *without interest; for he recovered other lands equal only in value to the lands sold at the time of the sale. The rule would have been the same at this day, had not the action for *mesne* profits been introduced, which takes away from the purchaser the intermediate profits of the land. As long as he was permitted to reap the rents and profits, they formed a just compensation for the use of this money. Whether the action for *mesne* profits has not been carried too far in our law, by extending it to all cases, instead of confining it to a *malu fide* possession, it is now too late to inquire. I should have strong doubts at least, upon the present rule, if the question was new, but considering it as the established rule, that the action for *mesne* profits lies generally, I am of opinion that the seller is as generally bound to answer for the interest of the purchase-money, and that the interest ought to be commensurate, in point of time, with the legal claim to the *mesne* profits. This right to interest rests on very plain principles. 'The vendor has the use of the purchase-money, and the vendee loses the equivalent by the loss of the *mesne* profits. The interest ought to commence from the time of the loss of the

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mesne profits. That time is not specifically stated in the present case, and the presumption is, that they were recovered from the date of the plaintiff's purchase, and from that time, I think, the interest ought to be calculated on the consideration sum.

As to the costs of suit attending the eviction stated in the case; it is very clear that the defendants are responsible under the covenant, for the testator was bound to defend and protect the plaintiff and his assigns in the title he had conveyed. At common law, he might have been vouched to come in, and been substituted as a real defendant in the suit. But the defendants are not answerable for the costs of the suit for *mesne* profits, as there the testator was not bound to defend.

My opinion accordingly is, that the plaintiff in the present case is entitled to recover the consideration paid for the moiety of the lot evicted, together with interest thereon from the date of the purchase, and the costs of suit in ejectment for the recovery of the same.

LIVINGSTON, J. To find a proper rule of damage in a case like this is a work of some difficulty; no one will be entirely free from objection, or not at times work injustice. To refund the consideration, even with interest, may be a very inadequate compensation, when the property is greatly enhanced in value, and when the same money *might have been laid out to equal advantage [*116] elsewhere. Yet to make this increased value the criterion where there has been no fraud, may also be attended with injustice, if not ruin. A piece of land is bought solely for the purposes of agriculture; by some unforeseen turn of fortune, it becomes the site of a populous city, after which an eviction takes place. Every one must perceive the injustice of calling on a *bona fide* vendor to refund its present value, and that few fortunes could bear the demand. Who, for the sake of one hundred pounds, would assume the hazard of repaying as many thousands, to which value the property might rise, by causes not for-

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seen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee. The safest general rule in all actions on contract, is to limit the recovery as much as possible to an indemnity for the actual injury sustained, without regard to the profits, which the plaintiff has failed to make unless it shall clearly appear, from the agreement, that the acquisition of certain profits depended on the defendant's punctual performance, and that he had assumed to make good such a loss also. To prevent an immoderate assessment of damages, when no fraud had been practised, Justinian directed that the thing, which was the object of contract, should never be valued at more than double its cost. This rule a writer on civil law applies to a case like the one before us; that is, to the purchase of land which had become of four times its original value when an eviction took place; but, according to this rule, the party could not recover more than twice the sum he had paid. This law is considered by Pothier as arbitrary, so far as it confines the reduction of the damages to precisely double the value of the thing, and is not binding in France; but its principle, which does not allow an innocent party to be rendered liable beyond the sum, on which he may reasonably have calculated, being founded in natural law and equity, ought in his opinion to be followed, and care taken that damages in the cases be not excessive. Rather than adhere to the rule of Justinian, or leave the matter to the opinion of a jury, as to which may, or may not be excessive, some more certain standard should be fixed on. However inadequate a return of the purchase-money must be in many cases, it is the safest measure that can be followed as a general rule. This is all that one party has received, and all the actual injury occasioned by the other. I speak now of a

[*117] *case, and such is the present, where the grantee has not improved the property by buildings or otherwise, but where the land has risen in value from extensive causes. What may be a proper course, when

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dwelling-houses or other buildings, and improvements have been erected, we are not now determining. Why should a purchaser of land recover more than he has paid, any more than the vendee of a house or a ship? If these articles rise in value, the vendors would hardly, if there be no fraud, be liable to damages beyond the prices they had received with interest and costs, unless the plaintiffs could show some further actual injury which they had sustained in consequence of the bargain. The English books afford but little light on this point, although it is understood to be the rule in Great Britain to give only the consideration of the deed. The only thing to be found anyways relating to the subject, is in the Year Books in Hilary term, 6 Edw. II., part 1, 187. It is there said, that in a writ of dower after the land had been improved by the feoffee, they shall be extended or set off to the widow, according to the value at the time of alienation, and the reason assigned by Hargrave in his notes on Coke on Littleton, which is not, however, found in the Year Books, is, "that the heir not being bound to warrant, except according to the value of the land at the time of the feoffment, it is unreasonable the widow should recover more of the feoffee than he could, in case of eviction, of the feoffor." In Connecticut, on the contrary, damages are ascertained by the value at the time of eviction, because of land's increasing worth, which is the very reason, perhaps, it should be otherwise. And although the English practice be adverted to by the court in giving its opinion, it is supposed to be founded on the permanent value of their lands; but when we recollect that this has been the rule in Great Britain, at least from the commencement of the fourteenth century, since which time lands have greatly advanced in price, we must attribute its origin to some other cause; probably to its intrinsic justice and merit. Even in Connecticut, the rule applies only to actions on covenant of warranty, and probably not to those on covenant of seisin, because, in the latter case, it is supposed the party may immediately acquaint himself with the

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strength of his title, and bring his action as soon as he discovers it is defective. This reason is not very satisfactory, for with all his diligence a long time may elapse before his title is called in question, or doubts or suspicions raised about its validity.

[*118] *Without saying, then, what ought to be the rule, where the estate has been improved after purchase, my opinion is, that where there has been no fraud, and none is alleged here, the party evicted can recover only the sum paid, with interest from the time of payment, where, as is also the case here, the purchaser derived no benefit from the property, owing to a defective title. The plaintiff must also be reimbursed the costs sustained by the action of ejectment. It was his duty to defend the property, and the costs to which he has been exposed being an actual, not an imaginary loss, arising from the defendant's want of title, he ought to be made whole. In costs are included reasonable fees of counsel, as well as those which are taxable. If a grantee be desirous of receiving the value of land at the time of eviction,^(a) he may, by

(a) The damages under the covenants of seisin and for quiet enjoyment are settled to be limited by the consideration money paid, the interest upon it, costs of eviction, and those of the suit brought; for improvements made, and the increased value of the property, a recovery cannot be had. *Pitche v. Livingston*, 4 Johns. Rep. 1; *Marston v. Hobbs*, 2 Mass. Rep. 433. Where the plaintiff has not been evicted, but has continued in possession and received meane profits to the day of action brought, interest for only six years will be allowed. *Caulkin and others v. Harris*, 9 Johns. Rep. 325. Under the covenant of "free from encumbrances," an antecedent mortgage is a breach, and the plaintiff will be entitled to recover his consideration money, interest, costs of defending himself in the suit by the mortgagee, and those of the action on the covenant. *Waldo v. Long*, 7 Johns. Rep. 173. If there has not been any eviction, the damages will be only nominal; but if the mortgage has been extinguished by the plaintiff, the sum disbursed for that purpose, interest, and costs, will be the measure. *Prescott v. Trueman*, 4 Mass. Rep. 627. It seems to be admitted in the case last cited, that should a plaintiff, under the circumstances detailed in it, be allowed to recover his consideration money, he would be entitled to hold the land also; but may it not be supposed that in such a case, equity would deem him a trustee for his grantor, and oblige him to reconvey?

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apt covenants in the deed, if a grantor will consent, secure such benefit to himself.[1]

The other judges concurred.

Judgment for the plaintiff.

[1] A purchaser, under a general covenant for quiet enjoyment, is entitled to recover back the consideration money paid, with interest for six years; the price agreed upon between the parties being taken as the true value of the land. *Moak v. Johnson*, 1 Hill 99; *Kennedy v. Watts*, 14 Wen. 41.

The buyer, on the covenant of seisin, recovers back the consideration-money and interest, and no more. The interest is to offset the claim for mesne profits, to which the grantee is liable, and is commensurate in point of time with the legal claim to mesne profits. The grantor has no concern with the subsequent rise or fall of the land by accidental circumstances, or with the beneficial improvements made by the purchaser, who cannot recover any damages either for the improvements or the increased value. This, says Kent, appears to be the general rule in this country. See 4 Kent's Com. 475; *Smith v. Story*, 14 Pick. Rep. 128; *Sterling v. Peet*, 14 Conn. Rep. 245; *Staats v. Ten Eyck*, 3 Caines' Rep. 111; *Pitcher v. Livingston*, 4 Johns. Rep. 1; *Bennet v. Jenkins*, 13 Johns. Rep. 50; *Marston v. Hobbs*, 2 Mass. Rep. 433; *Caswell v. Wendell*, 4 Mass. Rep. 108; *Bender v. Fromberger*, 4 Dal. Rep. 441; *Wilson v. Forbes*, 2 Dev. N. O. Rep. 30; *Seamore v. Harlan*, 3 Dana's Ken. Rep. 415; *Tupley v. Labeaume*, 1 Missouri Rep. 552; *Martin v. Long*, 3 Ib. 391; *Buckmaster v. Grundy*, 1 Scammon's Rep. 312, 313; *Earle v. Middleton*, 1 Cheves' Law and Equity S. C. Rep. 127. The measure of damages, on the covenant of warranty, in Massachusetts, Maine, Vermont, and Connecticut, is the value of the land at the time of eviction, without regard to the consideration in the deed. See 4 Kent, 475, and cases cited. "This rule," says Kent, "was adopted in the first settlement of the country, when the value of the land consisted chiefly in the improvements made by the occupants; and, if the warranty would not have secured to them the value of those improvements, it would not have been of much benefit to them. In other states, the measure of damages, on a total failure of title, even on the covenant of warranty, is the value of the land at the execution of the deed, and the evidence of that value, is the consideration-money and costs. If the subsisting encumbrances absorb the value of the land, and quiet enjoyment be disturbed by eviction by paramount title, the measure of damages is the same as under the covenants of seisin and warranty. The uniform rule is to allow the consideration-money, with interest and costs, and no more. If the encumbrance has not been extinguished by the purchaser, and there has been no eviction under it, he will recover only nominal damages, inasmuch as it is uncertain whether he would ever be disturbed. If, however, the grantor had notice to remove the encumbrance, and refused, equity would, undoubtedly, compel him to raise it and decree a general performance of a

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covenant of indemnity, though it sounds only in damages. The ultimate extent of the vendor's responsibility, under all or any of the usual covenants in his deed, is the purchase-money, with interest; and this, I presume to be the prevalent rule throughout the United States. If the eviction be only of a part of the land purchased, the damages to be recovered under the covenant of seizin, are a rateable part of the original price; and they are to bear the same ratio to the whole consideration that the value of the land to which the title has failed bears to the value of the whole tract. The contract is not rescinded so as to entitle the vendee to recover back the whole consideration-money, but only to the amount of the relative value of the part lost." 4 Kent's Com. 475, 476, 477.

A vendor sells land to which he has no title, either in law or equity; if he acquires a title afterward, he should convey to the vendee. If such vendor, after he acquires title, conveys the land to another, he is answerable to the first vendee for the value of the land at the date of the conveyance. *Graham v. Hackwith*, 1 A. K. Marsh. 423. If a vendor is able to make title to a part only of the land sold, the election devolves on the vendee to take the title for so much as can be made, and go for damages as to the remainder, or go for damages as to the whole. *Firman v. Rogers*, 1 A. K. Marsh. 427. *Dart's Vendors & Purchasers*, p. 375, n. (1).

JACKSON, *ex dem.* C. and J. VOUGHT, *against* WOOD.

Braine's patent is bounded by the line of the manor of Rensselaer.

THE only question in this cause was respecting the location of Braine's patent, granted in the year 1752. If it extended to the line of the manor of Rensselaer, the plaintiff would be entitled to recover; if there should be a gore between Braine's patent and the manor line, then the premises would be covered by that under which the defendant claimed.

THOMPSON, J., delivered the opinion of the court. We think Braine's patent is bounded on the manor line. This grant is not designated with reference to any adjoining patent. The only expressions which give it locality, are those which describe it as part of Butler's Indian purchase in 1733, that it had been formerly surveyed by Edward Col-

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lins for Richard Riggs, and that it began at the southwest corner of a tract of land near the township of Schenectady, formerly surveyed for James Delancey and others. It appears that Collins's survey is lost, and all that we know of the locality of Riggs's tract is, that it contained 2,000 acres lying in Albany county, near or upon the Norman's kill and within Butler's purchase. It also appears that the survey for Delancey and others, referred to in Braine's patent, is lost, and we are therefore obliged to resort back to the cotemporary acts of the parties, to determine at this day the true location of Braine's patent. For *when a grant does not contain with- [*119] in itself the requisite evidence of its location, the next best evidence of the intention of the parties is those concurrent acts *in pais*, by which the bonds were reduced to certainty, and possession given. We have the testimony of two witnesses, who were present and took a part in the survey of the patent, which was made by the surveyor-general, the year before the patent bears date, under a warrant issued at the instance of Braine. These witnesses refer back to a survey corresponding, in point of time, with the one ordered, and they state that Braine and the surveyor-general were present. From the testimony of one of these witnesses, who was a chain-bearer, it appears that the patent was located on the manor line, as to the southern boundary. The beginning in the grant is described to be at the southern corner of the tract surveyed to James Delancey and others, which tract, from the evidence in the case, appears to have been on the manor line. The petition of Mr. Duane, in the year 1764, (from which it was allowed on the argument that the defendant derives his title, admits the manor line as to the western boundary of Braine's patent. This shows his understanding at that time respecting the location. The grant to him the following year, erecting his township, recognises also the same location, and may be deemed in some measure expressive of the sense of government on the subject. It is

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of considerable importance in locating Braine's patent, to ascertain the southwest corner of the Schenectady patent, and true southern boundary of that of Corysbush. The Schenectady patent purports to extend 462 chains south of the Mohawk river; Corysbush runs on the line of this patent to the southwest corner thereof, and then extends on the same course 198 chains further, at which place begins Braine's patent. The place recognised and possessed as the southwest corner of the Schenectady patent, is more than 462 chains south of the Mohawk river. It appears, however, by the testimony of Cockburn, that at the termination of the 462 chains, there is no marked tree or monument, but that the tree marked and recognised as the southwest corner, is further south. He also says, that at the termination of the 160 chains, which is the length given of the Corysbush line, there appear to be no marked trees, but that about a quarter of a mile further south, there is a line of marked trees across the south end of Corysbush patent. If the southwest corner of the Schenectady patent be correctly located at the place now recognised as such, and not controlled by the length of chains given in the grant, and the line of marked trees across the south end of Corysbush patent, as mentioned by the witnesses, be the true line, (both of which, from the testimony in the case, we are inclined to think ought to be considered as settled according to the present location,) then giving to Braine's patent its length of chains, it will extend down to the manor line, and no gore be left. But if the testimony of Peak, the chain-bearer, is to be credited, it will, we think, remove every doubt with respect to the location of Braine's patent. The survey referred to by him must have been made before the issuing of the patent, and the one on which the grant was founded. The time spoken of is about the date of the patent, and the internal evidence arising from the recitals in the grant, speaks a language not to be contradicted. The petition of Braine, the warranty of survey, and the return to that sur-

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vey, are all recited. These were acts of government, and must be considered as satisfactory evidence that the grant was made upon actual survey. Peak says, the survey he attended began at a beach tree on the manor line. If this be the survey upon which the patent issued, which we think must have been the case, the conclusion is irresistible that Braine's patent is bounded on the manor line. From this brief review of the material parts of the case, we are satisfied that Braine's patent was located in the year 1751, under the authority of government, and with the consent of the grantee, upon the very lines now set up by the plaintiff; and that this location received the subsequent acquiescence of government, and was generally known and agreed to until about the year 1766. Under these circumstances we are of opinion, that the location was binding upon the parties to it, and, consequently, that the plaintiff is entitled to judgment.

LIVINGSTON, J., gave no opinion, having been concerned.
Judgment for the plaintiff.

 RUAN against PERRY.

Trespass will not lie against a naval officer, for bringing to, and taking out of her course, a neutral vessel, if it be done in pursuance of instructions from the secretary of the navy, although, in consequence of being so taken out of her course, she be captured by another nation, and condemned as prize, unless there appears to be collusion between the captors and the defendant. If an action be brought, charging the defendant with fraud from mere circumstances, evidence of general character is admissible. It is for the jury to determine whether circumstances of general conduct show a fraudulent intent.

THIS was an action of trespass brought against the defendant, who was commander of the United States frigate General Green, for seizing and taking the Danish schooner

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William and Mary and her cargo, the property of the plaintiff.

The declaration contained two counts; one charging the defendant with seizing, arresting, and for a long [*121] time detaining the *vessel and cargo, and conveying them towards Jackmel in Hispaniola, out of the course of the voyage on which bound, by means whereof they were attacked, seized, and carried away as prize, by persons on board a French barge, in the service of Toussaint, in consequence of which they became totally lost to the plaintiff. The other with doing the same, and delivering up the vessel and cargo to the barge of Toussaint, by which, &c.

The cause was tried before Mr. Justice Livingston, at the New York sittings, in January, 1805. At the trial the plaintiff examined his captain as a witness, and read the deposition of one of the crew of the schooner, from which it appeared that the vessel and cargo, both the *bona fide* property of the plaintiff, a Danish subject, sailed from St. Croix bound to Acquim, a port in Hispaniola, about ten leagues from Jacmel, and had arrived within four or five leagues of their destination, when they were brought to by the General Green, a boat from which boarded the William and Mary, took possession of her, ordered out all her hands but the mate, and carried them on board the defendant's ship. That, immediately after this was done, the frigate proceeded in company with the schooner towards Jacmel, and having arrived off that place, fired some guns, within an hour after which an armed barge came out from that port, commanded by a white officer in uniform, said to be Toussaint's, and manned with negroes. That the officer came on board the frigate, delivered letters to the defendant, and received some from him. That the French officer commanding the barge, the master of the William and Mary, and the captain of another Danish vessel brought by the defendant, dined with him. That about two hours after dinner was over, the defendant gave back the papers

Ruan v. Perry.

of the *William and Mary* to her captain, and sent him in the frigate's boat on board his own vessel, alongside of which he arrived about the same time as the French barge, which had quitted the *General Green* a little before the departure of her own boat. That, finding the French were getting on board the schooner, the captain of her claimed protection from the American officer who had conducted him from the frigate, but he, without replying, went back to his own ship then lying within gun-shot. Upon this the schooner and her cargo were, by the crew of the barge who had taken possession of her, carried into Hispaniola, where they were shortly after condemned as prize to a privateer, to which the barge that had taken them belonged.

That *the mate of the *William and Mary* was [*122] claimed by the defendant as an American, and given up. That within a few days after, the *General Green* being still off Jacmel, 55 bags of coffee were brought on board, weighing 1,000lbs., which, as was understood and believed in the ship, was a present to the defendant from Toussaint. On the cross-examination of the master of the *William and Mary* it appeared, that another Danish schooner, which had also been brought to by the *General Green*, had escaped capture by following the advice of the defendant in keeping under his lee, and that the witness himself entertained no idea of being captured till he saw the Frenchmen getting into his vessel. On the part of the defendant was exhibited a part of his instructions from the navy department, by which he was directed, in order to carry into effect the act "for suspending the commercial intercourse between the United States and France and the dependencies thereof," to take and send in vessels covered by Danish and other papers, if suspected to be really American. Testimony of the defendant's general character was then offered, and objected to, but admitted, because the imputation of a gross fraud was attempted to be proved by mere circumstances, and, therefore, evidence of general character certainly admissible. The defendant then ad-



C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW YORK,

IN AUGUST TERM, IN THE TWENTY-NINTH YEAR OF OUR INDEPENDENCE.

CLARK *against* FROST and WIFE.

Affidavits or documents in support of a deponent's character, which has been impeached, may be read, though copies have not been served; but if they only in a collateral way establish his character, by proving the truth of the ground of motion, which has been contradicted, they are inadmissible. An affidavit by a third person, of facts in the knowledge of a party, on which the application is founded, cannot be read, as it ought to be, by the party himself; and if he be unable to attend a commissioner, the commissioner ought to go to his house.

SIMONDS, on an application to set aside a default and all subsequent proceedings, relied on an affidavit made by the defendant's son, setting forth an agreement to stop all further measures in consequence of a settlement then made, and showing as a cause for the deposition being by the son, that his parents were so old and infirm they could not go to a commissioner to be sworn, but that he, the deponent, having been employed to take care of their interests, was perfectly acquainted with the merits of the cause, and all that had taken place.

Bogert v. Bancroft.

HOLMES *against* WILLIAMS.

Service, by leaving at the house of an agent, should state his absence.

THE affidavit of service of notice, stated it to have been "by leaving it at the dwelling-house of the agent of the attorney."

Per Curiam. It is not sufficient. You ought to have stated that the agent was absent, and to whom delivered.[1]

[*127]

*BOGERT *against* BANCROFT

A notice, signed by a counsel for the attorney on record, is good, if the attorney has absconded: but, generally, all notices, &c., must be in the name of the attorney in the suit.

WILLIAMS moved in this cause, on a notice signed by himself, "for A. B.," the attorney.

W. P. Van Ness excepted to the signature, as not being that of the attorney himself.

Williams, in reply. He is in embarrassed circumstances, and could not be found. But, independent of this, the signature is sufficient. Stipulations signed by counsel alone have been held good; (*Willcox v Woodhall*, 1 Caines' Rep. 250;) so his subscription to a case made at a circuit is sufficient.

[1] Service on a Sunday of a notice is void. *Field v. Park*, 20 Johns. Rep. 140.

Where two attorneys are in partnership, the business being done in the name of one, service of papers may be on either. *Lansing v. McKillup*, 1 Cowen, 416.

JACKSON v. Ferguson.

Per Curiam. Under the circumstances of this case, we think the signature sufficient. But we do not by this mean to say, that subjoining the name of a counsel in a cause, is, in these incidental proceedings, adequate to that of the attorney. We rather think it is not.

Motion denied.

JACKSON, *ex dem.* FISHER, against FERGUSON.

The court will not indulge to the next non-enumerated day to prepare affidavits in opposition, unless the party asking the indulgence, can allege some reason why he was not prepared.

ON a motion for a judgment as in case of non-suit, after due service, and when the attorney was in court, the counsel for the plaintiff asked till the next non-enumerated day to prepare an affidavit in opposition.

Per Curiam. To entitle to such a favor, some reason should be offered evincing why the affidavit could not be prepared; because the period of service ordered by the rules of the court, is, otherwise, presumed sufficient to enable the party to be ready.

Motion granted.

THE PRESIDENT AND DIRECTORS OF THE NEW WINDSOR
TURNPIKE ROAD against WILSON.

The court will not change the *venue* in a turnpike cause, on an affidavit stating the disposition of the county to be unfavorable to turnpikes, though it may be a good reason for applying for a struck jury.

FISK, in an action for running a road parallel to that of the corporation in order to draw off and injure the toll, moved to change the *venue* from Orange to New-York, on

Jackson, v. Stiles.

an affidavit, stating that, from the prejudices of the county against turnpike roads, an impartial trial could not be had.

Per Curiam, stopping *Henry*. It is impossible to conceive, that, in so large a county as Orange, twelve indifferent men cannot be obtained to try a cause against an individual, for his sole act. In such small counties as Richmond, [*128] *where fishery rights are concerned, in which almost the whole community is interested, the general dispositions of the people may warrant the application; but if it be allowed in the present instance, on every turnpike cause we shall have similar requests. Why not go into Dutchess, if it were necessary to take the trial to another county? The present motion must be denied, though the reason on which it is founded might be a good reason for asking a struck jury. (a)

JACKSON, *ex dem.* ROOT, *against* STILES; VANBUSKERK,
Tenant.

Depositions before commissioners, &c., must be signed by them with their names of office.

It was ruled, in this cause, that the jurats of affidavits taken before judges of the common pleas, or commissioners, must be signed by them, with the addition of their official descriptions; judges of the common pleas to style themselves such, and commissioners to specify that they are so. [1]

(a) See *Zibulskie v. Brader*, 1 *Caines' Rep.* 492, n. (a). *Spencer v. Sampson*, *ibid.* 498, n. (a).

[1] The copy of an affidavit served on the opposite party need not be signed with the deponent's name, nor have the jurat. *Livingston v. Chestnut*, 2 *J. R.*, 479.

If the affidavit begin with the deponent's name, it is a sufficient signing. *Haff v. Spicer*, 3 *Cal. R.* 190; *Jackson ex dem. Kenyon v. Virgil*, 3 *J. R.* 540.

 Brooks v. Hunt.

An affidavit is defective, sworn to before a deputy clerk. *Norton v. Ott*, 2 Wen. 250. Altered by statute, Laws of 1831, p. 279.

When a statute requires an affidavit without directing before whom, it may be taken before any one authorized to take an affidavit. *Wood v. The Jefferson Co. Bank*, 9 Com. 194.

An affidavit taken before a notary public of New Hampshire allowed to be read. *Rucker v. Lead*, 4 Cow. 47.

The office of commissioners to take affidavits under the act of 1818, in the cities became vacant by the appointment of new commissioners for the cities under the act of 1823. *Browne v. Osborne*, 2 Cow. 457.

The act (sess. 41, ch. 55) of the 24th March, 1818, authorizing the appointment of commissioners to perform certain duties of a judge of the supreme court, did not supersede the commissioners appointed by that court for taking affidavits. *Jones v. Smith*, 16 J. R. 332.

In collateral matters, as on a motion for a commission to examine witnesses abroad, affidavits may be taken before a magistrate, or public officer out of the state. *Marshall v. Mott*, 13 J. R. 423.

An affidavit taken before an officer who is an attorney in the cause cannot be read. *Taylor v. Hatch*, 12 J. R. 340.

But after where such officer is only counsel in the cause, and not attorney. *Williams v. Judd*, 15 J. R. 581.

So, where he is not attorney of record, though he is a partner of the attorney of record. *Hallenbach v. Whitaker*, 17 J. R. 2.

Judges of the courts of common pleas are, *ex officio*, commissioners of the supreme court to take affidavits. *Hopkins v. Menderback*, 5 J. R. 234. 1 N. Y. Dig., pp. 44, 45.

 BROOKS against HUNT.

The affidavit to ground motion for judgment, as in case of non-suit, must show where the venue was laid.

HENRY moved for judgment as in case of non-suit, on an affidavit merely stating for "not bringing the cause to trial at the last circuit in and for the county of Montgomery," according to the practice of the court.

Paris, contra, objected that it did not specify where the venue(a) was laid.

(a) This ingredient is not required by the English practice. See Tidd's Forms, 194; 1 Sell. Prac. 365, o.

Brooks v. Hunt.

Henry insisted it appeared from irresistible implication to have been in *Montgomery*.

Per Curiam. The affidavit is defective. Had this cause been with a *venue* in New York, the same mode of swearing would have entitled you to your judgment. We are not to infer facts from affidavits, when the party has it in his power to state them positively. The motion must be denied.[1]

[1] The affidavit should be made by the defendant's attorney himself, and should state that the cause was not tried. *Jackson ex dem. Metcalfe v. Woodworth*, 3 Cal. R. 136. *Bird v. Moore*, 3 Hill, 447.

The affidavit upon which to move for judgment as in case of a non-suit, must show there has been a circuit at which the plaintiff might have tried his cause. The court will not take judicial notice that there has been such a circuit. *Anonymous*, 6 Cow. 388.

It is not necessary to state in the affidavit that the cause might have been tried, had it been noticed where the venue is laid in any other than New York; when the venue is laid there, such fact must be stated. *Russell v. Barnes*, 13 J. R. 156.

In a case decided in 1808, where the venue was laid in Essex, it was shown that had the cause been noticed, it could not have been tried; the court held the excuse insufficient, saying that the rule adopted in respect to New York causes was not intended to apply to country causes. *Ross v. Vaughan*, 3 J. R. 442. See *Currie v. Moore*, 1 J. R. 492, and preceding case.

A defendant is bound to show affirmatively that a circuit has been held, at which the cause might have been tried. *Matter of Bradstreet*, 6 Cow. 388.

An affidavit to found a motion for judgment as in case of non-suit may be made by the defendant as well as by the attorney; but the affidavit of the clerk of the attorney will not be received. *Ames v. Merriman*, 9 Wen. 498. See *Bird v. Moore*, 3 Hill, 447.

On moving for judgment as in case of non-suit, it is enough, *prima facie*, that the defendant's affidavit show that the plaintiff had noticed the cause for trial at the circuit, where it is alleged, he omitted to try, without expressly stating that the venue was laid there. *Cass v. Bellmap*, 5 Cow. 422. N. Y. Dig., vol. 3, p. 224, *et seq.*

Jackson v. Valentine.

JACKSON, *ex dem.* COBLEY, *against* VALENTINE.

Neither judgment as in case of non-suit, nor costs, nor stipulation, where, from all antecedent causes being relinquished under a belief that they could not come on, a young issue got an unexpected chance of trial.

WHERE, on the last day but one of a circuit, there appear so many old causes to be tried, that the judge himself is of opinion it seemed impossible a young issue could be brought on, and from this conviction, so many of the suitors go home that an unexpected opportunity offers of trying a *young cause, the plaintiff in [*129] which had, with his witnesses, left the circuit, the court said he was not in default; and, on a motion for judgment as in case of non-suit, not only refused the application, but excused from costs and stipulation.

KIBBE and TITUS *against* STODDARD.

To gain a priority on a motion for judgment upon a frivolous demurrer the notice must state the frivolousness as the ground of application.[1]

EMOTT moved in this cause for judgment on a frivolous demurrer, on which account he claimed a priority, upon a simple notice of bringing on the cause to argument.

Per Curiam. Your notice should have stated that you meant to apply on account of the frivolousness of the demurrer, otherwise you cannot gain any preference.

Motion denied.

[1] See *McCabe v. McKay*, 2 Cal. R., p. 100, and cases cited.

Williams v. Green.

WILLIAMS *against* GREEN.

Rule for reference at a circuit is void, award, of course set aside, but, as act of court, without costs.

It was ruled that a circuit court cannot order a cause to be referred under the statute.(a) That any award, therefore, under a rule for a reference(b) granted at a circuit, must be set aside, but without costs, as the rule, though a nullity, is an act of the court.

COFFIN, Executor, *against* TRACY.

Confessing a judgment in a justice's court, will not give it jurisdiction in a suit by an executor.

IN ERROR from a 10th court, the defendant relied on the now plaintiff's having confessed judgment in the inferior tribunal, and, therefore, this case was distinguishable from those in which the court had determined an executor could not sue before a justice of the peace.

Per Curiam. Consent will take away error, but neither that nor confession will give jurisdiction.[1]

N. B.—This cause was tried in the court below before the act of the last session.

(a) Act for the amendment of the law. 1 Rev. Laws, 846, a. 2.

(b) See 1 Caines' Rep. p. 7, n.(b.)

[1] Justices' courts can take nothing by implication; but are strictly confined to the authority given them by statute. (1 J. Cas. 20; 1 Cal. 191.) The rule is well settled, that if a justices' court acts in a matter of which the statute has given it no jurisdiction, its proceedings are absolutely void. (17 J. R. 145; 3 Cow. 369; 11 J. R. 175.) Nor can the parties confer jurisdiction by their own acts. Thus, if a justices' court try an action for slander, libel or assault and battery, the proceedings are void, though the parties appear and consent to go to trial. (3 Cow. 206; 1 Wend. 210; 8 J. R. 109 14 J. R. 432.)

Shadwick v. Phillips.

SHADWICK *against* PHILLIPS.

The rule respecting reducing agreements into writing, extends to parties in the suit, as well as to attorneys. See 1 Caines' Rep. 148, n. (a.)

ON an application for judgment as in case of non-suit for not proceeding to trial, the affidavit stated that the plaintiff, as he was going to subpoena his witnesses, met the defendant, who said he could not procure his in time, and begged him not to bring on the suit. This he consented to, and the verbal agreement thus made, it was insisted, took the case *out of the operation of the twelfth [*130] rule of April, 1796, which, it was argued, was obligatory only on officers of the court.

THOMPSON, J. The simple question is, as to the validity of the agreement; whether the court is not bound to notice it, though not reduced to writing. Our rule, (Cole 9,) is, "That no private agreement or consent between the parties, &c., shall be alleged or suggested by either of them against the other, unless the same shall be reduced," &c. We think that it ought to extend to parties as well as attorneys in the suit. Such must have been the intention of the court; otherwise it would have been restrained to such as were entered into between attorneys. The words of the rule warrant our determination. It is as necessary between parties as their attorneys, and enforcing this construction will prevent much altercation. There is no difficulty in reducing any agreement into writing. In the present instance, indeed, the existence of the engagement is not contradicted, but it is not admitted; and if it be of no validity, it was unnecessary it should be denied. There may be a hardship in this case, but the court cannot violate what they think a proper and correct rule to enforce. But even the hardship will in some degree disappear, if we advert to the affidavits, which state that the parties informed

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their attorneys of the arrangement. It was, therefore, their duty to go on, notwithstanding what passed between their clients.

SPENCER, J. I cannot coincide in this decision. It is true, with the general law of the land no man is supposed to be unacquainted, and therefore ignorance of it is no excuse. But this presumptive knowledge is not to be extended to our private rules of court. Our officers, indeed, may be supposed conversant of them, for they are intended to be always present here in person. In the case now before us the rule operates most unjustly. A plaintiff on the way to subpoena his witnesses meets a defendant, and to oblige him, because he could not be ready with his, consents not to bring on the cause, and merely on account of this agreement not being reduced to writing, he is now to be nonsuited. I think the practitioners in this court were the subject matter of the rule, and it ought to affect them only.

TOMPKINS, J. I fully concur in the opinion last given.

*LIVINGSTON, J. I did not intend to have given [*181] my reasons for coinciding with the decision pronounced by Mr. Justice Thompson. But to me it appears of more importance that the rule should apply to parties than attorneys. The latter, if they abide honorably by their engagements, know exactly the extent of them, and to what they apply; but a suitor can hardly ever determine the effect of his own words, and we shall have eternal disputes upon how far they mean to go. The construction now made is clearly within the letter of the rule, and were it to be made anew, I should be for its comporting with the present decision.[1]

KENT, Ch. J. The defendant takes nothing by his motion.

[1] See Rule of N. Y. Supreme Court, No. 37 of 1852.

Brandt v. Berrian.

FALL and SMITH, Overseers of the Poor of New Wind-
BOR, *against* BELKNAP.

Practice on arguments.

IF an affidavit of service state that the party did serve his opponent with notice of bringing on the cause to argument, it is, without setting forth or producing the notice itself, sufficient to entitle to judgment, if the opposite side do not attend.

BRANDT, *ex dem.* PALMER, *against* BERRIAN.

Though agreements be not in writing, and though they be not on that account resisted, but admitted, the court will not give effect to them, if the party do not, by consent, waive the want of reducing to writing.

THIS was an application for the costs of the last circuit at West-Chester, upon an affidavit, that just as the plaintiff was ready for trial, the defendant verbally agreed to leave the matter to arbitration, which he had since refused to do, though, from a reliance on his promise, the cause was not brought on.

Munro admitted all the facts, but said he was not authorized to consent to the motion.

Per Curiam. Though an agreement by parol is admitted, and its being merely verbal not urged against it, or relied on, if not consented to, it cannot have effect. But in this case, the plaintiff is premature in his application. He must wait till the costs of suit are taxed, and then he will be entitled to them.[1]

Motion denied.

[1] See 2 Cal. Rep., p. 95, cases cited; also rule 37 Supreme Court, 1852.

Jackson v. Howd.

JACKSON, *ex dem.* ROSEKRANS, *against* HOWD.

Affidavit of service, stating it from information of a clerk who had indorsed the papers served, and had quitted the state, is good.

THE affidavit of service was by the attorney, on information from his clerk that it had been duly made, [*152] according *to an indorsement on the notice produced, made by the clerk, who had quitted this state, and gone into Connecticut, where he then was.

Per Curiam. The affidavit is sufficient, and as full as the circumstances of the case would admit.

OLNEY *against* BACON.

Where an agreement entered into after notice of motion, does not reach the end of the application, it will not be construed to be a waiver of it; and if from misapprehension it be so considered, and a default entered, on expiration of an order to stay proceedings, subsequent to which the motion is made and obtained, the default, though regular, will be set aside on costs and terms.

AN order had been obtained, on behalf of the plaintiff, to stay proceedings till the fourth day of last term, for the purpose of affording an opportunity to move for a rule, directing the justice, in the court below, to amend his return, by inserting a written document adduced in testimony before him. By some accident the attorney intrusted with the papers did not arrive in New York till after the fourth day, and on the sixth, the defendant entered a default against the plaintiff for not assigning errors according to notice, after which the plaintiff, on the last day of the term, obtained his rule to amend, no one appearing to oppose.

Olney v. Bacon.

Woodworth, on these facts, detailed by affidavit, moved to set aside the default and subsequent proceedings.

Foot, contra, relied on a stipulation entered into between the attorneys in the cause, by which it was agreed that the written evidence referred to in the return, was the order or draft therein mentioned. This, he contended, was adequate to the amendment to be moved for, and superseded the necessity of application; therefore, errors not being assigned at the time the order expired, the defendant was regular in his default.

Woodworth, in reply. The stipulation reached only to the identity of the paper, the mere production of which was not evidence, and the object of the motion was to procure a return of it, to show it was no testimony, without being corroborated by witnesses. Besides, when a party does not appear to oppose, he waives all objections.(a) *Eklart v. Bearman*, 2 Caines' Rep. 379.

Per Curiam. The stipulation was defective, for the object of the plaintiff could not have been obtained by it; nor does it state to have been made with a view of superseding the necessity of an application to the court. But the order to stay proceedings having, in fact, expired before the default for not assigning errors was entered, the defendant *was regular; though, as [*133] there has been some misapprehension, and a delay from accident, it must be set aside on payment of costs and assigning errors in twenty days.

(a) See *Jackson v. Giles*, ante, 32, n. (a.)

Quick v. Merrill.

TEUNIS QUICK *against* MERRILL.

Notice of bail imports notice of retainer as attorney.

If the misprision in entitling a cause do not mislead, or be not such as is likely to do so, it will not prejudice.

It did not appear that notice of retainer of attorney for the defendant had been received, but notice of bail was admitted, an exception to which was taken, (on a motion to set aside a default, and other proceedings, accompanied by an affidavit of merits,) that it was entitled "Benajah Merrill *ads.* Jeunis Quick;" and the want of notice of retainer was also urged.

Per Curiam. Notice of bail necessarily imports a notice of retainer as attorney.(a) As to the title of the notice, the ruling principle is, that if the party served be not misled, or the papers be not such as evidently may mislead, a mere clerical misprision shall not prejudice. It does not appear that there was any other cause depending against Merrill. In liberal practice the notice ought to have been received, and the objections must, therefore, be overruled.

(a) After notice of retainer, all subsequent notices must be on the attorney. *Driggs v. Van Loon*, Cole, 50; Vide Code, s. 417, 1852. Where notice of retainer has been received from two attorneys, the plaintiff cannot appear to recognise one, and yet serve the other. *M'Keely ads. Morrison*, Cole, 61. If sent by mail it is good. *Church ads. Kane*, Caine's Prac. 56; *Delbringham v. Lamb*, Id. ib. It seems that the general principle is, where the notice, &c., given, does not mislead, it is good. See *Doe v. Roe*, 4 Esp. Rep. 185; *Batton v. Harrison*, 3 Bos. & Pull. 1. Even a copy of an answer in chancery, signed "Amev" but entitled "Eamev," was held to support an allegation in the declaration of an answer of "Eamev." *Salter v. Turner*, 2 Camp. 87.

 Jackson v. Stiles.

BOYCE against MORGAN:

The issuing of the warrant or summons in a justice's court, is the commencement of the suit.

IN ERROR on *certiorari* upon an agreement entered into, on the 28th of December, not to sue a third person, the gravamen was laid that he since that time had sued, and the summons was dated on the day of the agreement. On this the defendant below insisted on a non-suit; but the plaintiff refusing to submit to it, a verdict was given in his favor. It was now contended that the levying the plaint was the commencement of the suit; but the court, on the authority of *Lowry v. Lawrence*, 1 Caines' Rep. 69, ruled, that issuing the summons, or warrant, was the beginning of the action, and reversed the judgment; the suit appearing on the face of the record to have been instituted previous to any cause of action accrued.[1]

Judgment reversed.

**JACKSON, *ex dem.* NORTON, against STILES; GROVER,
Tenant.**

In ejectment, if the tenant swear to a good and substantial defence, the court will set aside a regular default, entered in consequence of the tenant's mistake in imagining that the supreme court was held at the circuit.

RUSSEL moved to set aside the default and all subsequent proceedings, on an affidavit admitting due service of *the declaration and notice, but adding, [*184] that he thought the supreme court, at which he was noticed to appear, sat at Salem, in the county where the lands in question lie; nor did he know to the contrary till

[1] See *Waterman's N. Y. Tr.* p. 56, *et seq.*

Wilson v. Guthrie.

a few days before the circuit court, when he was first informed that the supreme court did not sit at Salem, and that the court held there was only for the trial of issues joined in the supreme court, and that he had a good and substantial defence.

Shepard, contra, insisted that the sittings of the supreme court being regulated by statute, were matter of general notoriety, and therefore no excuse was shown for the default. Besides, there had been a loss of a trial.

Per Curiam. This is an ejectment: were we not to interfere, the possession would be changed. Take your motion on payment of costs.

WILSON *against* GUTHRIE.

A regular default set aside upon payment of costs, the defendant having supposed the suit in the common pleas, and having retained an attorney to defend there.

ON an affidavit by the defendant, that when served with the writ in this cause, he supposed the suit to be in the common pleas, and had "a substantial defence," corroborated by the deposition of his attorney, that he was retained to defend upon information by the defendant that the suit was in the common pleas, and knew not to the contrary till he gave notice of retainer, the court set aside a regular default and subsequent proceedings upon payment of costs.[1]

[1] See N. Y. Digest, vol. 2, tit. *Default*.

 Hinckley v. Boardman.

HINCKLEY *against* BOARDMAN.

Where a verdict has been rendered in this court for less than 250 dollars, and afterwards set aside, the ordering supreme court costs is discretionary; but though none be specified, if it be on payment of costs, and the party obtaining the rule, serve a copy of a bill of costs of this court, with notice of taxation, and the party served do not attend, on which an *ex parte* taxation takes place, and supreme court costs are allowed and paid, it is a waiver of the right, if any, to insist on common pleas costs.

RUSSEL, on an affidavit, stating that in the present suit the recovery had been less than 250 dollars; that the verdict had been set aside on payment of costs, which had been taxed at those of this court, and paid over, moved, on the part of the defendant, that the taxation should be reviewed, and every thing received beyond the costs of the common pleas returned.

Shephard, contra, read an affidavit, stating that after the rule to set aside the verdict had been obtained, he, as attorney to the plaintiff, made out the bill of costs, and submitted *it to Mr. Russel, who made objections to some items, all of which were immediately struck out. That notice of taxation was then duly served, but no person attending on behalf of the defendant, the bill was taxed *ex parte*, the costs received, and the allowance for the attendance of witnesses actually paid to the plaintiff. [*135]

SPENCER, J. When the motion was made for a new trial, we were asked to grant a favor; the terms on which we would accord it were in our discretion, and had costs been mentioned, we ought, in my opinion, to have allowed those of this court.

THOMPSON, J. I do not think so. The rule was intended to be on payment of legal, taxable costs. It is not

WITMORE v. RUSSEL.

to be supposed that a plaintiff should, on a defence, recover more than on a default.

LIVINGSTON, J. When interlocutory matters are set aside, we ought not to look forward to what might be recovered, or back on that which has been; supreme court costs appear to be the most proper to be awarded.

TOMPKINS, J. I conceive when the verdict was set aside, it was on payment of such costs as were legally due. But I consider the defendant, by not attending the taxation after service of a copy of the bill of costs, to have waived all opposition to their amount.

KENT, Ch. J. He should have appeared and contested the taxing. His not doing so is a waiver of his right. Had it been otherwise, I should think the costs of the common pleas only were recoverable, though we certainly might have allowed supreme court costs had we pleased so to do. As things are, you can take nothing by your motion, and must pay the costs of resisting.

WITMORE *against* RUSSEL.

If a stipulation be given before motion made to entitle to costs upon it, it should be entered, and a rule for judgment *nisi* taken out, and served with a certified copy of the rule and a copy of the bill of costs.

ON an application for judgment as in case of non-suit, the defendant wished to include, in the costs now ordered to be paid, on stipulating, those taxed on a former stipulation,^(a) given without motion, but not entered with the clerk.

^(a) See 1 Caines' Rep. 7 n. (a). Ibid. 155, n. (a).

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Per Curiam. You should have filed your stipulation, entered a rule *nisi* for judgment, served a certified copy of the rule, with a taxed bill of costs, and made a demand of payment. *You can take nothing by [*136] your motion unless you account for the not doing so.

N. B. This being done, the defendant obtained his costs, but the plaintiff had leave to stipulate again.

LEONARD *against* SUNDERLIN.

An affidavit for leave to amend a justice's return, in matters of fact, should specify them, that the court may judge whether they are material.

SHEPARD moved for leave to permit a justice to amend a return on an affidavit, stating that it was made out by one of the attorneys in the suit, and on examination he finds it "incorrect in point of fact, and defective as it existed before him."

Per Curiam. The affidavit is insufficient. It should have specified the points in which it was intended to amend, that we might see whether the errors now existing were material.(a)[1]

(a) See *Schoonmaker v. Trans*, 2 Caines' Rep. 110.

[1] This motion to the common pleas to amend, is either by the party, where the return is imperfect, in order to compel the justice to supply the defect, (3 John. 439; 2 Caines, 384; 1 Ib., 501), or else it may be made in behalf of the justice, where he has committed a mistake from the management or imposition of the party or his attorney, or, indeed, where the mistake happens from any other cause. 2 Caines, 139; 5 John. 350. In the latter case, the return may thus be corrected, either in behalf of the justice, or of the party with his consent, upon an affidavit, which should always state the precise point in which the amendment is sought, in order to enable the court to judge of its materiality. 3 Caines, 136. The rule should also contain the particulars in which such amendment is to be made, in order to instruct the justice where to amend in his own behalf, or to compel an amendment in

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behalf of the party. And, unless this is the case, it is presumed that the rule would be a nullity. In the first case, the justice should procure an office-copy of the rule for his own sake; in the latter, it must be served on him by the party, before he can be compelled to amend. Where the return is imperfect, the justice may, by arrangement between the parties, gratuitously make a supplementary return, supplying the defect; but, where a motion is made to amend, the usual notice of the motion, &c., must be given to the opposite party. 2 Caines, 258; 5 Johns. 350. Where a justice made a supplementary return, and then another return contradicting it, the court refused to receive either and proceeded upon the first. 7 Johns. 548. And, where he had given a certificate of proceedings in the cause, and afterwards contradicted them by affidavit, the court refused an order to amend, according to the certificate. 3 Caines, 84. And in all cases, where the first return is precise, specific, and full, a further return cannot be obtained by the party, on making an affidavit supplementary to the one on which the certiorari was founded. 2 Johns. 182.

These amendments may be ordered at different stages of the suit, according to the circumstances of the case, and the person applying. In one case, a justice was allowed to amend a clerical mistake, on payment of costs, even after the cause had been argued, and the opinion of the supreme court had been delivered, reversing the judgment. 2 Caines, 134. In another case, he was allowed to amend, after the cause had been noticed for argument, upon an affidavit that he was led into the mistake by the management and imposition of the plaintiff's attorney. 5 John. 350. And the defendant will be allowed, under special circumstances, to move for the amendment of a clerical mistake, even after a joinder in error. 3 Caines, 83. But the plaintiff cannot, in general, move to amend after an assignment of errors, and especially, after noticing the cause for argument. 2 Caines, 333; 1 John. 493. But the manner, time, &c., in which a party must apply to the court to have the justice's return amended, and the practice and proceedings thereon, are now generally regulated by the rules of the different courts of common pleas, it being provided by statute, that they shall have the power to compel the justice to make or amend his return, by rule, attachment or mandamus, as the case may require. 2 R. S. 185, s. 179. And no assignment of errors or joinder in error is now necessary, (2 R. S. 185, s. 180,) except where error of facts is assigned.

It is not necessary on service of the rule to amend, to make out a new return complete. It may be done with less trouble, and with equal effect by a supplemental return.

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JACKSON, *ex dem.* METCALFE, *against* WOODWORTH.

The affidavit to ground a motion for judgment of non-suit, ought to be by the attorney in the cause, and state that the cause was not brought to trial.

THE affidavit for judgment as in case of non-suit, in this cause, was made by the clerk of the attorney for the defendant, and though it stated a notice for trial, it did not allege that the suit was not tried.

Weston, for the plaintiff, relied on the above circumstances as conclusive against the application.

Per Curiam. For the reasons assigned, you can take nothing by your motion.

Motion denied.

VAN RENSSELAER *against* HOPKINS, bail of SHELLEN.

If the writ against bail be returnable so soon after service, that the defendant cannot, from the distance at which his principal resides, surrender him in time, the court will enlarge the period.

EMOTT moved for time to surrender the principal, on an affidavit by the bail, stating that the *capias*, returnable on the first day of this term, was not served on him till the 22d of July; that Shelden resided 75 miles west of him, and he himself near 300 miles west of Albany, to which place it was necessary to send for a copy of the bail piece, so that it was impossible to make the surrender in due time. That the plaintiff had sued out a *fi. fa.* against the goods of Shelden, which the opponent had been informed, and at

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the time verily believed to be true, was a complete exoneration from his liability.

Per Curiam. Take your motion.(a)[1]

Motion granted.

(a) The power of bail to take and surrender their principal, may be exercised by deputy, (*Boardman and Hunt v. Fowler*, 1 Johns. Cas. 413,) and without the jurisdiction of the state in which the action is brought. *Nicolls v. Ingersoll*, 7 Johns. Rep. 145. Our court is not so rigid in exacting a surrender within eight days, as the courts in Westminster Hall; sickness of the principal is an excuse for not doing it, (*Boardman and Hunt v. Fowler*, *sup.*) and would, therefore, it is presumed, be a reason for enlarging the time; which will be done if the bail have been lulled into security. *Livingston v. Barles*, 4 Johns. Rep. 478. Where an attorney has, from *bona fide* motives, assented to a discharge from custody on giving to the sheriff one bail who turns out insolvent, the court will permit the attorney, after having filed common bail, to put in special for the purpose of a surrender. *Gilchrist v. Van Wagenen and Moore*, 1 Caines' Rep. 499. The surrender is complete before entering the *exoneretur*, which may be done at any time. *Strang v. Barber and Griffin*, 1 Johns. Cas. 329. The application to the court for leave to surrender, ought not to be made till after the eight days in term have expired, for till then the right of the bail to surrender continues by law. *Ellis v. Hay*, id. 334; see 1 Caines' Rep. 11, n. (a).

[1] A defendant surrendered by his bail is not entitled to be discharged from imprisonment, on the ground that the plaintiff had given notice of exceptions to the bail, where no exceptions had in fact been entered on the bail piece. *Lawrence v. Graham*, 9 Wen. 477.

Such notice would have discharged the bail; but the bail not having availed himself of the right to a discharge growing out of the exception, the defendant can claim no advantage under it. *Id.*

Bail have eight days in full term to surrender their principal. *Mayell v. Follett*, 7 Wen. 507.

The plaintiff, however, may proceed in his suit against the bail, subject to the right of the bail to surrender their principal, and to be discharged, on payment of costs. *Id.*

Bail on recognizance will be relieved on such a *bona fide* attempt to surrender within the eight days allowed for the surrender. *Warner v. Hayden*, 3 Wen. 251.

The right of the bail to discharge himself by a surrender of the principal ends with the return of the *ca. sa.* in the original suit; and the eight days are allowed as matter of grace rather than right. *Stewart v. Patton*, 1 Hall, 38.

The force of the special bail piece is spent by arrest on a *ca. sa.* though the

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prisoner escape; and he cannot afterward be surrendered by his special bail. *Ex parte v. Badgley*, 7 Cow. 472.

A surety for the jail liberties has no power, as such, to surrender his principal to close confinement. *Id.*

To warrant this, the technical relation of principal and bail must exist. *Id.*

Though a defendant be discharged under the insolvent act, if he have time to plead the discharge, but omit to do so, an exoneretur will not, after judgment, be ordered in favor of his special bail, on account of the discharge. *Campbell v. Palmer*, 6 Cow. 596.

They must surrender in the ordinary way. *Id.*

A judge at chambers, or a commissioner, &c., may order an exoneretur, or the discharge of the principal under the body act, in the same manner, as on an actual surrender. *Cunningham v. Brown*, 5 Cow. 289.

The discharge is conclusive, and cannot be questioned, as against the bail, for irregularity or fraud. *Id.*

Bail may surrender their principal, and obtain an exoneretur on motion, after the eight days allowed, *ex gratia*, for surrender, if the surrender within that time was prevented by sickness of the principal. *Thomas v. Bulkley*, 5 Cow. 25.

And this, though no order to stay proceedings, or rule for enlarging the time to surrender, was obtained within the eight days, the sickness of the principal not being known to the bail within that time. *Id.*

The eight days during which special bail may surrender, *ex gratia*, are to be computed of those within the regular teste and return days of process. *Wiggins v. Wilson*, 5 Cow. 420.

If a defendant omit to plead his insolvent's discharge to a *sci. fa.*, whereby judgment by default goes against him, he is concluded; yet, in such case, if the bail apply within eight days after the return of the writ against them, the court will, upon a proper case being made out, give time to surrender, as they would do in other cases. *Franklin v. Thurber*, 1 Cow. 427.

And in the mean time they will stay the proceedings, and will further order, that, on surrendering the defendant and paying the costs of the action, proceedings against them be perpetually stayed. *Id.*

Where, on a surrender, and committitur of the defendant by his bail, the plaintiff consented to an exoneretur, this was deemed a sufficient discharge, as it regarded the plaintiff; as the exoneretur might be entered by the bail, at any time, and pleaded. *Kellogg v. Munro*, 9 J. R. 300.

Sunday is to be reckoned one of the eight days. *Brown v. Smith*, 9 J. R. 84.

Bail may depute another to take and surrender their principal. *Nicolls v. Ingersoll*, 7 J. R. 145.

The right to surrender, resulting from the relation between the bail and principal, is to be effected as circumstances shall require, and is not a personal power or authority to be executed by the bail only. *Id.*

That bail may depute *ex necessitate*. See *Boardman v. Fowler*, 1 J. C. 413.

The bail may take their principal out of the jurisdiction of the court in

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which they entered into their recognizances, and that even in a different state. *Nicolls v. Ingersoll*, 7 J. R. 146.

So, bail to an action in Connecticut, were allowed to take their principal here. *Id.*

After demand, they may break open an outer door. *Id.*

And may take their principal on a Sunday, and may confine him till the next day, and then surrender him. *Id.*

The time allowed the bail is *ex gratia*, and they must, at their peril, surrender at that time. *Olcott v. Lilly*, 4 J. R. 407.

The principal was sued in 1800, and made no defence, but judgment was not docketed till 1808; in the meantime, the defendant had been in jail, was reputed insolvent, and sometime after removed into another state; the bail were arrested on a writ, returnable in May term, 1809; on the ground of surprise on the part of the plaintiff, the court, in August term, 1809, permitted the bail to surrender their principal, on payment of costs of the suit on recognizance. *Livingston v. Bartles*, 4 J. R. 478.

After the time for surrender has expired, the court will not relieve the bail by ordering an exoneretur on the ground that the defendant is a resident and not liable to arrest. *Stever v. Sornberger*, 19 Wen. 121.

Whether the bail can, in any stage of the proceedings, move for an exoneretur on such ground. *Id.*

In an action on a recognizance of bail put in, in a court of common pleas, prosecuted in this court, the time of surrender is governed by the practice of this court, and not by that of the court in which the recognizance was taken. *Ward v. Moser*, 19 Wen. 158.

Bail are not fixed, till the expiration of eight days in full term after the return of process against them; until after the expiration of which time they may surrender their principal. *Kane v. Ingraham*, 2 J. C. 403; *Strong v. Barber*, 1 J. C. 329; *Ellis v. Hay*, *Id.* 334; *Brown v. Smith*, 9 J. R. 84; *Broumelow v. Forbes*, 2 J. R. 101.

And the surrender may be made without application to the court. *Ellis v. Hay*, 1 J. C. 334.

If a plaintiff elect to sue special bail jointly, he who is first taken shall have time to surrender, till the last is taken also, and till the time, allowed the last for surrendering, is expired. *Ballard v. Kibbe*, C. C. 51.

If he sues them separately, then each may be separately fixed, or one may be fixed, and the other may afterward surrender the principal, and be discharged, so that, in fact, the plaintiff may have the body in custody, and, at the same time, go on with a suit against the other bail, who has been fixed; but he can have only one satisfaction. *Id.*

The court refused to enlarge the time for surrendering on an affidavit, stating that the bail had mistaken the time of the return of the capias against him, and the absence of the principal from the state. *Rathbone v. Warren*, 4 J. R. 310.

The time for surrendering the principal was enlarged on an affidavit, stating the service of the capias to have been made but a few days before its re-

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sum, and the residence of the defendant and his bail at a great distance from the place of holding the court. *Van Rensselaer v. Hopkins*, 3 Cal. R. 136.

Permitting the bail to exonerate themselves, by a surrender of their principal, within eight days after the return of the process against them, is, technically speaking, *ex gratia*; but is, notwithstanding, in effect, no further *ex gratia*, than that the costs in the suit on the recognizance are always required to be paid. *Brounlow v. Forbes*, 2 J. R. 101.

The bail are relieved after surrender of their principal, on motion and not by plea. *Id.*

The revised statutes authorizing surrender of principal by sureties for bail limits, at any time before judgment against them, does not entitle them to have the bond given up after suit commenced on an alleged escape. *Betts v. Livermore*, 1 Sandf. 684.

Where the defendant is in prison on a charge of felony, he may, at the instance of his bail, be brought up upon a *habeas corpus*, that he may be surrendered. *Bignell v. Forrest*, 2 J. R. 482.

Where a suit is brought on the recognizance, and the principal is surrendered within the time allowed, the costs must be paid before an exoneretur can be entered. *Parker v. Tomlinson*, 2 J. C. 220. *Brounlow v. Forbes*, 2 J. R. 101.

The exoneretur will be allowed, although the bail have been indemnified by their principal. *Brounlow v. Forbes*, 2 J. R. 101.

The sickness of the bail is an excuse for not surrendering the principal within the eight days. *Boardman v. Fowler*, 1 J. C. 413; S. C., C. C. 108.

The exoneretur will be permitted to be entered where the surrender has been duly made, after the expiration of the eight days. *Strang v. Barker*, 1 J. C. 329.

When exonerated on payment of costs, the bail must seek the plaintiff, and pay them, without waiting for a demand, or tender of a bill. *Cathcart v. Cannon*, 1 J. C. 220; S. C., C. C. 80.

Though a defendant be discharged under the insolvent act, if he have time to plead the discharge, but omit to do so, an exoneretur will not after judgment be ordered in favor of his special bail, on account of the discharge. *Campbell v. Palmer*, 6 Cow. 596.

They must surrender in the ordinary way. *Id.*

A judge at chambers, or a commissioner, &c., may order an exoneretur, on the discharge of the principal under the body act, in the same manner as on an actual surrender. *Cunningham v. Brown*, 5 Cow. 289.

The discharge is conclusive, and cannot be questioned, as against the bail for irregularity or fraud. *Id.*

Where a defendant has obtained his discharge under the insolvent act, after a judgment against him, which is revived by *sci. fa.*, personally served, his bail will not be relieved on motion. *Franklin v. Thurber*, 1 Cow. 427.

Where the defendant neglected to avail himself of his discharge under the insolvent act, but allowed judgment to be perfected against him, the court

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by retail, any strong or spirituous liquors, without having such license as aforesaid, or if any person shall sell any strong or spirituous liquors, to be drank in his or her house, out-house, yard, or garden, without having entered into such recognizances as aforesaid, every person who shall be guilty of either of the offences aforesaid, shall forfeit, for each offence, the sum of twenty-five dollars: Provided always, that no person shall be subject to be prosecuted by virtue of this act, for selling metheglin, currant-wine, cherry-wine, or cider, to be by such person made, and which shall not be drank in his house, out-house, yard or garden." By the 16th section the penalties are recoverable "by any person who shall prosecute for the same; one moiety, when recovered, to be paid to the overseers [*188] of the poor." The declaration was "as well for"

Hewit "as the overseers of the poor," &c., that the now plaintiff "did sell, or allowed to be sold, strong or spirituous liquors, to be drank in his house, contrary to the form, &c., and therefore," "the aforesaid Thomas Blasdell is indebted," &c. To this the defendant demurred specially, "because it was not set forth to whom the said strong or spirituous liquors were sold, nor where;" and the demurrer being overruled, the cause went on by consent, as if upon the general issue, in which the jury found a verdict for the plaintiff.

Weston, for the plaintiff in error, assigned the following reasons: 1. That the action was in the name of the plaintiff below, and that of the overseers; whereas it ought, by the statute, to have been in his own; 2. That though the overseers of the poor of the town were entitled, the declaration did not state time or place where the offence was committed; 3. That it was in the alternative, "sold, or allowed to be sold," and, therefore, wanted certainty; 4. That the kind of liquors sold was not stated; 5. That the declaration did not negative the selling to be of the

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liquors mentioned in the proviso; 6. That conviction was not set forth.

Per Curiam. The first point relied on for error has been determined against you this term, in a cause under the act for the inspection of flour. See *Ferris v. Obles*, post, 207. The answer may, therefore, be confined to the other objections.

Shepherd, contra. By consenting to go to trial, the new plaintiff has waived all exceptions to the proceedings. As to the last error urged, it is never required to state a conviction, in order to warrant a judgment.

KENT, Ch. J. The act Section 16, 1 Rev. Laws, 490, gives the moiety of the penalty to the overseers of the town in which the offence is committed; this alone is fatal.

SPENCER, J. The declaration wants time and place; nor, does it negative the qualifications of the "proviso."^(a) For all of these reasons it is, therefore, bad.

LIVINGSTON, J. It ought to have been shown what liquors were sold, and perhaps to have negatived the others.

THOMPSON, J. The declaration is clearly defective on the last ground taken by Mr. Justice Spencer.

Judgment reversed.

^(a) This ought to be the "clause." See *Houghton v. Strong*, 1 Caines' Rep. 486, and note there.

Van Drisner v. Christie.

[*139] *GARDINIER *against* CROCKER.

A clear mistake of the time when a writ is returnable, will, if merits be shown, excuse a default, on payment of costs, and pleading issuably.

W. VAN NESS moved, in an action of assault and battery, to set aside the default and subsequent proceedings on two affidavits; one by the defendant, stating that he thought the writ was returnable as of this term, and had a good and substantial defence; the other by himself, that he had been retained to defend, but was informed the writ was returnable the first Monday in this August, and had not, therefore, given notice of retainer.

Van Vechten, contra, stated the writ to have been returnable in May.

Per Curiam. Take your motion on payment of cost and plead issuably.

VAN DRISNER *against* CHRISTIE.

In real actions, motion must be made for judgment.

In dower, and all real actions, judgment cannot be entered without motion in open court.

Mumford v. Cammann.

MEIKS *against* CHILDS.

Practice to obtain bonds filed for security for costs.

THE clerk cannot give up bonds filed for security for costs in an action where a non-resident is plaintiff; the application must be to the court, and the affidavit on which it is founded should state the due taxation of costs, the name of the surety, and the non-residence of the plaintiff.

MUMFORD *against* CAMMANN.

The rule as to changing the venue, by a defendant, on account of the residence of his witnesses, does not apply between the counties of Kings and New York. See 1 Caines' Rep. 1, 2, *et seq.*

THIS was an application to change the venue from the county of Kings to the city and county of New-York, on an affidavit, that all the witnesses of the defendant resided in the city of New-York.

Per Curiam. The rule we have laid down, as to allowing the defendant to bring back the venue, when his witnesses reside in the county to which it is to be removed, and the plaintiff does not show that he has any where it is laid, cannot apply to a case like the present. The court-house of the county of Kings is so contiguous to the city of New-York that there is no hardship in carrying witnesses from one place to the other.(a) There is hardly a county in the state, *in which the witnesses who [*140] attend a trial, do not travel further than they will in the present suit. Take nothing by the motion.

(a) S. P. *Holcroft v. Colliest*, Andrews, 66.

Brandt v. Burrows.

JACKSON, *ex dem.* CRAMER, *against* STILES; WILLIAMS,
Tenant.

On application for attachment for costs on non-suit, for not confessing lease, &c., the affidavit must show that there was authority to demand them given by the lessor.

ON motion for an attachment for not paying costs, on account of the plaintiff's being non-suited, for want of confessing lease, entry, and ouster, the affidavit must state that the person demanding them of the tenant was duly authorized by the lessor of the plaintiff, according to the English practice.(a)

BRANDT, *ex dem.* M'CLELAND, *against* BURROWS.

A notice for judgment as in case of non-suit, is not waived by a notice for a commission.

SCOTT insisted that the notice of motion for judgment as in case of non-suit, was waived by giving subsequent notice of an application for a commission.

Per Curiam. The defendant knew you were entitled to stipulate; he, therefore, comes prepared, if you do that, to make his other motion. If you elect to have judgment of non-suit against you, it is in your power. If not you must stipulate, and then the motion for the commission will be granted.

(a) Run. Eject. 415.

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JACKSON, *ex dem.* LAWYER, *against* STILES; PALMITIER,
Tenant.

Notice of motion to set aside proceedings against the casual ejector, and admit the tenant to defend, is not had because signed "attorney for the tenant."

QUACKENBOSCH objected to the notice of motion to set aside proceedings against the casual ejector, and that the tenant might be admitted to defend, because it was subscribed "attorney for the tenant."

Per Curiam. There is nothing in the objection.

REYNOLDS *against* BEDFORD.HERRICK *against* BEDFORD.

A demurrer to evidence is not a proceeding applicable to the ten pound act, and a justice may, therefore, overrule it, though there be no joinder in demurrer, or judgment prayed for. If a justice undertake to set out the oath he administered to a constable, and it vary from that prescribed, it is fatal notwithstanding he state that he "duly" administered it.

ON a *certiorari* in these causes to a justice's court, the errors relied on were, that in one it appeared on the face of the record, the justice overruled a demurrer to evidence, without any demand of judgment from the opposite party, or his having joined in it; till which period, it was contended, there was no issue in law. That in the other, the *constable, though said to be duly sworn, [*141] appeared not to have been so, as the oath set out was only "to attend the said jury, and to keep them together in a private place, until they had agreed on their

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verdict;" and that in both cases the witnesses were sworn to "maintain the action," instead of "to declare the truth."

Obdy, for the plaintiff, on the first point, cited 4 Bac. Abr. 187, (Old edition,) and on the last, *Day v. Wilber*, 2 Caines' Rep. 184.

Per Curiam. In the first of these causes, we think there is no error in the point relied on. The justice, in our opinion, was correct in overruling the demurrer. The act conferring jurisdiction to justices of the peace, gives to either party the right of trial by jury; and, when it is considered generally, that the justices cannot be much acquainted with the science of the law, it cannot be important to the parties litigant to draw the examination of facts from the jury to the court. An act of the last session enables every party aggrieved, to obtain a special return of the facts; (4 Sta. Laws, 476, c. 98,) and this, we think, ought to supersede demurrers to evidence. They are frequently interposed to entangle justice in the nets of the law; and we mean to be understood, that the inferior magistrate rightly overruled it, on the ground that it is a proceeding inapplicable to suits under the "act for the more speedy recovery of debts to the value of twenty-five dollars." The judgment in that cause must, therefore, be affirmed. In the second it must be reversed, agreeably to the decision in *Day v. Wilber*. For the justice has undertaken to set forth the oath he did administer; and as it is materially variant, the word "duly" cannot be of any avail.

Judgment of affirmance in the first cause.

Of reversal in the second.

Clendining v. Church.

CLENDINING and ADAMS *against* CHURCH.

Neither a want of averring interest, nor the words of the insurance being, "policy to be proof of interest," are of themselves evidence of a wager policy. On a wager policy, to entitle the assured to recover, the loss must be absolutely total; a technical total gives no right.

THIS was an action on a policy of insurance on the schooner Neptune, from Wilmington, North Carolina, to Kingston, Jamaica. At the foot of the instrument was a written memorandum in these words: "Warranting nothing; policy to be proof of interest, and no insufficiency of papers to be of detriment to the insured." The declaration contained no averment of interest in any one.

At the trial, it appeared that the vessel, when pursuing the voyage insured, was captured by a Spanish privateer, *and, on being chased the next day by a [*142] British armed vessel, was run, by the prizemaster, upon the rocks off the Island of Cuba. That while she lay there, she was boarded and re-taken by the boats of the British, who got her off, after being much injured in her bottom, and losing her anchors, cables and keel. That they then carried her to Jamaica, where she was libelled and restored, on payment of one eighth of her value for salvage, but on being hove down to be examined, was found to be so much damaged, that to repair her would cost more than the amount of the insurance, by which she was fully covered. In consequence of this, the captain, who was also owner, sold her for 120*l*, Jamaica currency, to Messrs. Curry & Co., who repaired her, but what it cost did not appear. No evidence of abandonment was offered.

On this testimony the plaintiffs rested their cause, and the counsel for the defendant moved for a non-suit, because, as it was a wager policy, and the Neptune did arrive, a loss had not happened; and allowing it to be an interest policy, on which the plaintiffs might, notwithstanding the restora-

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tion, recover an average loss, yet there was not any proof adduced to show its amount. The judge inclining to this opinion, ordered the plaintiff to be called, and as he did not answer, granted the non-suit.

Application was now made to set it aside on the following grounds: 1st. That the capture by the Spanish privateer made the loss total, and entitled the plaintiffs to recover; 2d. That if it was an interest policy, the plaintiffs were entitled to recover for a partial loss, the amount of which should have been submitted to the jury.

Rider, in support of the motion. On a wager policy, as there is no partial loss, a capture, though but for five minutes, creates a total one. On this subject the English decisions are not many, and those difficult to be reconciled. The first to which it will be necessary to call the attention of the court is *Depaba v. Ludlow*, Com. Rep. 261. In that case the vessel was, after capture, retaken; but the mere interruption of the voyage was held to give a right to recover. The same principle is found in *Pond v. King*, 1 Wils. 191. On a policy for time, the vessel was taken, retaken, and restored on salvage; yet the loss was [*143] ruled to be *total. In *Whitehead v. Bance*, Marsh. 426, a similar decision was made. *Pole v. Fitzgerald*, Willes, 641, does not apply. That was not a case of capture; and the question here is, does a capture make a total loss? On a wager, a capture gives a vested right, which subsequent restoration cannot defeat. On an interest policy, the rule is different, because it is a contract of indemnity, founded on property; the restoration, therefore, may affect the claim for a total loss, and make it only an average. No such reasoning can apply to a wager. On the second point, it is to be observed, that the words, "interest or no interest," do not necessarily make a wager policy. 1 Marsh. 99. That the present was a wager policy is not inferrible, from their being no averment of interest in any one. It is not essential to aver interest in an action

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on an interest policy. 2 Marsh. 591, citing *Crawford v. Hunter*, 8 D. & E. 13, where that point was settled on demurrer to the 4th count of the declaration. This, then, might have been an interest policy; the facts, therefore, ought to have been submitted to the jury to determine the extent of the partial loss, as they, in themselves, afforded a means of ascertaining the amount.

Pendleton and *Hoffman*, contra. The true policy on which wager policies turn is, has there been a total loss of the voyage? *Spencer v. Franco*, Park, 75. If not, a mere capture, which neither defeats the voyage, nor alters the property, gives no right of recovery. *Dean v. Dicker*, 2 Stra. 1250, acknowledges the same position. Lee, Ch. J., says, that had the ship been re-captured before carried *infra præsidia*, the decision, which was in favor of the plaintiff, might have been otherwise. In *Depaba v. Ludlow*, the voyage was defeated by the interruption. So in *Pond v. King*, the insurance was for time, and the cruise totally lost. The same principle is recognized in *Witherspoon v. Banks*, Marsh. 406. We admit that in this country, actions on wager policies may be maintained, and that if this be a wager policy, it was not necessary to abandon; but if this be not a wager policy, then we contend the nonsuit ought to stand. The facts could not warrant referring the case to the jury. They had no criterion to estimate an average, and could not be allowed, without a *datum* to go by, to settle one by guess. *Crawford v. Hunter* is not applicable to the *case before the court. In [*144] that case, the count demurred to had words tantamount to an averment of interest. But whatever may be the English decisions on this point, our policies have a clause which renders it necessary. The underwriter contracts to pay only after proof of loss and interest. Against this may be urged the memorandum. If so, then it is a wager policy, and within the arguments used on the first point. They are fully established by the decision in *Pole*

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v. Fitzgerald, which overturned the cases referred to by the opposite side, and established that on a wager policy there could be no technical total loss. It is not requisite that the ship should actually perish. If she arrive at a port, not that of her destination, it gives a right to recover; but when she does arrive there, a total loss cannot have happened, though a capture may have intervened.

Riker, in reply. The only reason why interest was ever thought necessary to be averred in a British policy, was to take it out of the 19 G. II. c. 37, against wagering insurances. Therefore, where the contract is upon foreign property, no averment of interest is required. *Nantes v. Thompson*, 2 East, 385. The determination in *Franco v. Spencer* turned on the evidence not maintaining the count. The declaration stated a capture by enemies; and it was proved that at the time when the vessel was taken, preliminaries of peace were signed, so that there was in fact no enemy existing. To protect the insured against a capture on a wager policy, the same words are used as in one on interest; on both, therefore, the construction must be the same.

KENT, Ch. J., delivered the opinion of the court. This must be considered in the light of a wager policy.[1] The words "policy to be proof of interest," are not considered as being of themselves evidence of a wager policy, (*Nantes v. Thompson*, 2 East, 390,) although the statute of 19 G. II., seems to prohibit policies with such clauses inserted, on the ground of their being wagers. Nor is the want in the declaration of an averment of interest in the plaintiffs, either in their own right, or as trustees, to be considered as decisive evidence of no interest, since it has been ruled in the case of *Nantes v. Thompson*, 2 East, 392,

[1] A wager policy is valid at common law, (*Jehol v. Church*, 2 J. C. 232. *Abbot v. Sebor*, 3 J. C. 39.)

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that such an averment is not requisite even in an interest policy. But these circumstances taken in connection with a fact stated in the present case, *that [*145] the captain was owner of the vessel, will determine the nature of the policy, especially as no agency or trust is anywhere pretended by the plaintiffs.

Assuming it, then, as a fact, that this is a wager policy, the question is, whether the capture by the Spanish privateer amounted to a total loss?

This was a bet upon the arrival of the vessel at Kingston, in Jamaica. The perils which may have happened to the vessel on the voyage are immaterial, provided she performed her voyage, for that determines the bet in favor of the insurer. It is stated that the vessel did arrive at Jamaica, and as no question is made about the particular port at which she arrived, we may intend that she arrived at Kingston. The intermediate capture was immaterial, as the voyage was performed before suit brought. This point does not, however, appear to be well settled in the books. Some of the cases, and particularly that of *Dean v. Dicker*, 2 Str. 1250, go to prove that even upon a wager policy, if the ship be taken, it is a total loss, however illegal the capture may be, and although the ship be taken or restored. *Marshall*, 424. But from what fell from Lord Mansfield, when speaking of the case of *Pole v. Fitzgerald*, in *Goss v. Withers*, 2 Burr. 695, and from what was observed by him and the other judges of K. B. in *Kulen Kemp v. Vigne*, 1 D. & E. 308, 310, the inference would rather seem to be, that a temporary capture, with a subsequent recovery and final arrival at the port of destination, was not a total loss in the case of a wager policy. This to me appears to be the most advisable rule.

A temporary capture, in the case of an interest policy, is a total loss only at the election of the insured, and unless he abandon pending the capture, he cannot make it a total loss. It is, therefore, not an absolute total loss, but a total loss at the election of the party. But in wager policies, the loss

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should be absolutely and finally total, for otherwise a temporary embargo of only a day, without any other interruption of the voyage, would be a total loss, although the vessel should have arrived in safety. I the more readily adopt this opinion, because wager policies ought not to be encouraged, and it is not pleasant that the time of the court should be occupied in discussing them.

[*146] *LIVINGSTON, J. Though I concur in the opinion of the court, as delivered by the Chief Justice, I shall trespass on the patience of the bar, in stating the reasons that have led to this coincidence.

There can be no doubt this was not intended as a gambling insurance. The policy is made "proof of interest," only to dispense with establishing that fact in the ordinary way. The nature of every insurance, whether on interest or otherwise, should, perhaps, always depend on the truth of the case, and not on any equivocal terms which may have been used for different purposes. Without determining, however, to which class this contract belongs, the *non-suit* was in either case proper.

If of the gaming kind, as the vessel arrived at Jamaica, a total loss did not happen, in which event only can there be a recovery. It was strenuously insisted that a capture, even for five minutes, confers a right to recover on such policy, which cannot be defeated by a subsequent release and safe arrival of the property. Were we to sanction so extravagant a position, all insurances, especially during a war, would be converted into wagers, as the merchant, on the slightest interruption, would receive payment for a total loss; and, also, if liberated, retain his property, the assurer himself not being entitled to salvage. It is astonishing that courts have ever intermeddled with wagers of any kind. It is not, however, for us to apply a remedy; this must be left to the legislature. In England this species of gaming is restrained by act of Parliament; and until our legislature provide the same wholesome checks, it is our

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duty not to hold out unnecessary encouragement to a practice, which, instead of promoting fair trade; the only legitimate object of marine insurance, is a direct incitement to the worst species of fraud. This we should do, were we to place the assured in a wager policy on a more favored footing than those who have a real interest at stake, which is the direct tendency of the plaintiffs' interpretation.

On an interest policy, it is conceded, that capture for a time is not a total loss, unless followed by abandonment while the restraint continues. If the cargo be valuable, or on its way to a good market, the owner will frequently prefer the chance of restoration to an immediate cessation; but *on the plaintiffs' principles, a moment's [*147] restraint fixes the underwriter of a wager policy, although the property immediately after arrive at its destined port. I should be sorry if this were law, but it is not, and mischievous would be the consequences of a rule of the kind. It is of no use to inquire what length of possession after capture divests an owner of his property; or whether the prize must be conducted *infra præsidia*, or if an actual condemnation must intervene. It is now well settled, that the only question which can occur between parties to a policy is, whether there was a capture in fact, with this difference, however, that on policies on interest, an abandonment may immediately be made, and the underwriter thus charged with a total loss; but on other policies, there can be no abandonment to fix the party, and, therefore, a right to recover cannot depend on the single circumstance, of capture, but on its consequences as to the future fate or destination of the vessel. As the assurer has no salvage and cannot be called on for a partial loss, his undertaking must necessarily be, not that the vessel shall not be taken, but that she shall not be lost thereby, or ultimately stopped in her voyage. If she arrive safe, even after a capture, he wins, or rather does not lose, the wager. Why, indeed, should a momentary obstruction by capture, any more than a detention to refit, after a fire or storm, be estimated a

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total loss? The injury in the first case is often less than in either of the other. Were the insurer's liability to depend on the naked fact of capture, how easy would it be, where there was an insurance on interest in the form of a wager, to induce a belligerent to possess himself of the property a little while, with the express view of charging the underwriter with a total loss. The assured might always, with a little management, win the wager, and at the same time secure his property.

But without further reasoning, the English authorities, cited by the plaintiffs' counsel, are directly opposed to his client's pretensions. In *Depaba v. Ludlow*, (Com. 361,) the court did not proceed on the fact of capture alone, but on the "damage which the plaintiff received by the interruption of his voyage;" for the vessel, on being recaptured, was brought to Harwich, and that, too, not until after an action was commenced on the policy. It is not mentioned [*148] whither the vessel was insured, but from the reasoning of the court, it could not have been to Harwich; and then, as she did not arrive at her destined port, the bet was clearly lost, and the defendant liable.

In *Pond v. King*, 1 Wils., the insurer undertook that a certain privateer should cruise in safety three months; the jury found she was prevented by capture from cruising for that period, and judgment was rendered against him, not merely because of the capture, but of its effects, for the interruption of the cruise, which was the subject insured, is expressly made the ground of decision; but even this authority is shaken, if not overturned, by a judgment of the House of Lords, which will be presently mentioned. In the case of *Dean v. Dicker*, 2 Str. 1250, at *nisi prius*, it does not appear whither the vessel was conducted after being cut out of a Spanish port, where she had been eight days; of course, it can form no authority here, and besides, it is very evident that Lord Chief Justice Lee was not governed by the solitary fact of a capture or short detention on the high seas, but considered the property as de-

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vested by being "detained eight days in an enemy's port." It might, says he, have been otherwise, if the ship had been recaptured before she was carried *infra præsidia*.

But if any obscurity remain after these cases, the question, how far a temporary interruption by capture amounts to a loss of the wager, the Exchequer Chamber and House of Lords have established conclusively in *Pole v. Fitzgerald*, Willes's Rep. 641, that "though a ship may be deemed for a time lost, yet, if she be afterwards recovered, a total loss has not happened within the meaning of the wager." Such is Lord Mansfield's understanding of this decision, (2 Bur. 695,) which, indeed, admits of no other, and contains in itself a complete answer to all that has been urged in favor of the assured. In *Kulen Kemp and others v. Vigne*, 1 D. & E. 304, the arrival of the ship is regarded as the event insured by a wager policy, and although there might have been an abandonment, if it had been an insurance on interest, yet, "as there was only a temporary capture, we must," says Lord Mansfield, "consider what the truth of the case is between the parties;" and because the vessel might have prosecuted her voyage after she was liberated, the underwriter was not held liable. This vessel *had been detained in Spain, in consequence of a [*149] capture, more than two years; but as she might afterwards have gone on to Marseilles, the plaintiffs were deemed not to have won the wager. The insured here, I admit, were very hardly dealt with, for after a sale of the cargo, and a condemnation in Spain, which was not reversed until after a detention exceeding two years, it could not be expected that the vessel was, in contemplation of the parties, to proceed in ballast to Marseilles. Without going the whole length of this decision, which is no authority with us, it however establishes, as well as the other cases, beyond the possibility of doubt, that in England the holder of a wager policy cannot recover, if the vessel reaches, or might have reached her port of destination, even after a detention by capture or otherwise. The Neptune, it will

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be remembered, reached Kingston after a very short obstruction. Neither, then, on the ground of authority, nor reason, can the plaintiffs' claim for a total loss be sustained.

If this bean interest policy, the non-suit is yet more free of difficulty. There being no abandonment during, or even after the restraint, the loss, it is granted, is not total. The objection to a verdict for a partial loss arose at the trial from the total want of evidence as to its extent. It is not enough to prove an injury, but its nature and *quantum* should be ascertained. This must be in the assured's power, and if he withhold, or neglect to produce the proper proof, a jury ought not to be permitted, at hazard of doing injustice, to come to a determination on vague and uncertain conjectures. No one, upon this evidence, can say whether a thousand dollars, or as many eagles, would have been an indemnity. As to the salvage, there was no proof whatever to what it amounted; it was an eighth of the *Neptune's* value at Jamaica, but what she was appraised at, or deemed worth in that island, does not appear; and it was of course impossible to say what was paid on that account. In trover for a ship, the value as well as the conversion must be proved. One vessel may be worth fifty thousand dollars, and another not as many cents. How, then, is a jury, without proof on this point, to come at a proper result? So the repairs of a vessel may cost a very large sum, or may not amount to as much [*150] per cent. as will entitle the assured to "any recovery. To let a jury determine without some evidence of this fact, (for here was none at all,) would be subjecting the defendant to an arbitrary assessment of damages, and allowing a plaintiff to take an advantage of his own *laches*. On this ground, I directed the plaintiffs to be called at the trial, and see no reason to change my opinion. The plaintiffs must take nothing by their motion.[1]

[1] A supercargo was to receive as his compensation, a gross sum out of the proceeds of the return cargo, or a part of the cargo to that amount, on

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arrival at the place where the voyage was to terminate; on the vessel's return voyage, she was compelled to put into a port of necessity, where the voyage was broken up, and the vessel and cargo sold. The supercargo cannot demand his compensation of his employers; but as it is an insurable interest, and if an insurance has been effected, there being a total loss, he may recover the whole from the underwriter. *Robinson v. New York Ins. Co.*, 2 Cal. R. 357.

The owner of a cargo, unauthorized by the owner of the vessel, repairs her on the voyage; and effects an insurance in his own name on his expenditures for repairs. The owner of the vessel had previously insured her; and after she had arrived at her port of destination, she was abandoned as for a technical total loss, by the owner, to his underwriters; and sold with their consent, and for their account. The owner of the cargo, who had made the repairs, then abandoned to his underwriters; held, that this was not such a total loss as come within the policy; that a constructive total loss of the subject was not enough, but the loss must be absolutely and finally total. *Buchanan v. Ocean Ins. Co.*, 6 Cow. 318.

A wager policy is valid at common law. *Juhel v. Church*, 2 J. C. 333. *Abbott v. Sebor*, 3 J. C. 39. *Glendinning v. Church*, 3 Cal. R. 141.

Insurance on profits: "no other proof of interest to be required but the policy; if the goods did not arrive, insured to recover for a total loss; warranted free from average, and without benefit of salvage;" this is a wager of policy. *Juhel v. Church*, 2 J. C. 333.

Insurance on profits or freight, where the insured has an interest in the subject which is to produce them, is not a wager policy. *Abbott v. Sebor*, 3 J. C. 39. N. Y. Dig., vol. 3, p. 104.

As to the nullity of wager policies, see *Pritchett v. Ins. Co. of North America*, 3 Yeates Rep. 464; *Edgell v. M'Laughlin*, 6 Wharton, 176; *Lloyd v. Leisenring*, 7 Watts. 294; *Craig v. Murfatroyd*, 4 Yeates, 168; *Collamer v. Day*, 2 Vermont Rep. 144.

 GIVEN against DRIGGS.

Notice to appoint a new attorney need not be by rule of court, and 30 days are sufficient, but it must be personal, or tantamount.

AFTER a new trial had been ordered in this cause, (1 Gaines' Rep. 450,) the plaintiff, on the 30th of June, 1804, personally served the defendant with a written notice of it, requiring him to appoint a new attorney, as his former one

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had been promoted to the bench, and that in default of so doing, all subsequent notices would be served by affixing the same in the office of the clerk of the court. The defendant not having nominated any new attorney, the plaintiff gave notice of trial in the manner above mentioned, and, at the last Albany circuit, took an inquest by default, upon which judgment had been entered and execution sued out.

Williams, on the above facts, now moved to set them aside, contending that the notice to appoint a new attorney ought to have been by a rule of court ordering it to be done.

Per Curiam. In the case of *Bennett* ads. *Vielie*, July term, 1802, it was decided that the party must be warned, or he is not bound to take notice of the proceedings; and in *Harvey* ads. *Hildrich*, January term, 1803, we ruled that the defendant must have personal notice, or such as the court would deem tantamount. Our statute, like that of Hen. IV., requires a warning, and the personal service here was a sufficient one, without any rule of court. The defendant was grossly in default, as nine months elapsed before the plaintiff went on. We think thirty days a sufficient and reasonable notice in these cases.

Application denied.

BEADLE against HOPKINS.

No notice of special matter is good, except under the general issue.

IN covenant, under a plea of performance, the defendant gave notice of special matter, and the judge [*151] at the trial *permitted equitable evidence to be

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given, upon which a verdict was taken for the defendant. The application was to set it aside and grant a new trial.

Per Curiam. The motion must be granted, with costs to abide the event of the suit. Under the plea in this cause, the notice was inadmissible, and the evidence, therefore, improperly received. The statute requires the general issue to be pleaded, where special matter is relied on in evidence, under the notice our law permits.

TOWER *against* WILSON, Sheriff of Washington.

The *nisi prius* record is always amendable by the issue roll, on payment of costs. Awarding a *venire* to the proper officer on an insufficient suggestion is, after verdict, cured by the statute of *jeofails*.

SHEPARD moved in arrest of judgment on the following grounds: 1. That there was variance between the issue roll and *nisi prius* record; the memorandum in the first being of January term, 1803, and that of the latter in 1804; 2. That there was no special suggestion that the sheriff of the county was interested, and no special award to the coroner, who appeared to have returned the *venire*.

Foots, contra, was stopped by the court.

Per Curiam. The issue roll is allowed to be correct, and the circuit record is always amendable by it on payment of the costs of the motion made. The second error is within the statute of *jeofails*, which, after verdict, cures the award of a *venire* to an improper officer, on an insufficient suggestion; *a fortiori* if the award be to the right person. Take nothing by your motion.

Jackson v. Brownell.

JACKSON ex dem. COLDEN against BROWNELL.

Where both sides have a right to notice a case for argument, and neither party brings it on, though called, the judge's order to stay proceedings continues good over the term.

WOODWORTH moved to discharge a judge's certificate to stay proceedings, because the plaintiff had not brought on the cause to argument this term, according to notice, though there had been ample opportunity. He contended that the certificate expired with the term, if the party obtaining it neglected to bring on the argument.(a)

Per Curiam. When the cause is of such a nature that either side may notice for argument, both are equally in default if it be not brought on. The only mode, in such a case, to get rid of a judge's order, is to give a counter notice, and when the cause is called on the calendar, to come forward and demand judgment. Here each party [*152] has *noticed, and neither one has moved; the application must, therefore, be denied. Had the cause been such that both parties could not have noticed, then the present motion would have been right.

Motion denied

ANONYMOUS.

On an intended motion to set aside a report of referees, a judge's order expires with the term.

A SIMILAR application was made to vacate a judge's certificate to stay proceedings, upon a report of referees.

(a) See *Kirby v. Cogswell*, 1 Caines' Rep. 506, n. (b).

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Per Curiam. Take your motion. This case comes exactly within the exception in the last.

CALEB KING against MATHEW FULLER.

If a plaintiff in a justice's court allege that he "let" the defendant have a horse, in consideration of which the defendant "let" him have another, it shows with sufficient certainty an exchange, and not a bailment. If a former trial be pleaded in a justice's court in bar, and state the trial so that it appear it could not, according to technical rules, have embraced the bar, the matter so stated will be rejected as surplusage, and if the justice seems to have pronounced on that, which is thus rejected to support the plea, the judgment will be reversed. A set-off allowed, though improperly, in a former suit before a justice, is a good plea in bar in another for damages on the ground of the set-off, though if exception be originally taken against the set-off, it may be urged as in this court.

ON *certiorari*. The now defendant declared, in the court below, that he "let the said Caleb have a certain bay horse, and a note of hand of sixteen dollars, in consideration of which the said Caleb let the said Mathew have a certain sorrel horse, which the said Caleb warranted to be a sound and good working horse, whereas he was totally unfit for all manner of business, to the damage," &c. To this the plaintiff here pleaded in bar, a set-off for these very damages, made by the defendant in a suit against him before another justice. Replication, denying the former trial, and alleging the illegality of the set-off. Rejoinder, affirming the former trial, and tendering an issue on that fact. Demurrer and joinder, upon which the justice ruled the plea insufficient, and without inquiry as to the fact of the former trial, went on to hear evidence on the point of damages, and pronounced judgment in favor of the plaintiff for twenty-five dollars.

Shephard, for the plaintiff. The decision of the magis-
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trate on the point of law was erroneous; for, on demurrer, judgment ought to be against him who commits the first fault. The declaration here is clearly bad; it wants time and place. Besides "letting" a man have a horse is not a sufficient consideration to maintain an action on a warranty; for, if the plaintiff below was a mere bailee, he sustained no injury from the unsoundness of the animal. The replication is also bad. In the next place, as there was an issue offered on the fact of the former trial, the justice ought to have awarded a *venire* on that [*153] point; instead of which he goes on to assess damages himself, on a matter in which no issue was pending, under the idea that the rejoinder was bad.

Weston, contra. The declaration is substantially good, for enough appears to show there was a demand, and form(a) is to be overlooked in pleadings before a justice. Substance, however, is required, and the plea shows the set-off was of such a nature, that it could not have been received.

Per Curiam. It has been objected, that the word *let* imports a bailment, and if so, that the unsoundness of the horse was immaterial, and not prejudicial to the plaintiff below. In reviewing the proceedings of magistrates, this court has decided that they will not require of the parties, who are to be presumed unversed in the forms of law, technical nicety, or legal precision. If the matter stated show a good ground of action, it is all that is requisite. To test proceedings in justices' courts by the rules of pleading adopted here, would be productive of the greatest injustice.[1] The act giving jurisdiction to justices of the peace requires of us, on *certiorari*, to pronounce judgment as the very right of the case shall appear, without regard to omissions, &c., in mere matters of form. In common

(a) The record throughout had not the semblance of legal forms or proceedings.

[1] As to pleadings in justices' courts, see Waterman's N. Y. Tr. page 84.

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parlance, "*et*," as used here, means *exchange*, and so the court will understand it.

With respect to the proceedings of the justice himself, the court will require a compliance on his part with the forms prescribed by the statute. If these have been departed from, and are not waived or cured by the statute of *joefails*, the proceedings cannot be supported. This principle was adopted in the case of *Day v. Wilber*.^[1]

The opinion expressed extends to the exception taken to the replication. It denies, substantially, that any trial had ever been had on the matter stated as the ground of the action. It also alleges that it could not lawfully have been set off; this the court will reject as surplusage and wholly irrelevant. But the last objection is fatal. After the defendant below had answered the replication by alleging that the same *matter had been [*154] tried, as stated in his plea, and tendering issue, the plaintiff demurred generally, and thereupon the justice decided in favor of the demurrer. There could have been no other ground for this determination than this: that the rejoinder did not answer that part of the replication which stated that it was unlawful for the plaintiff to have pleaded a set-off of this demand. That part of the replication we have been obliged to consider surplusage to support the replication itself, and it being so, an answer to it was unnecessary.

There has been injustice done by overruling the rejoinder, and thereby preventing the trial of a material fact, which, if true, ought to have barred the action.

We must not be understood as determining that damages arising from a fraud can be legally set off before a justice. If, however, it be pleaded, and is not objected to, and a jury pass upon it, the consent of parties thus to be implied, will take away the error; and it then becomes a

[1] See Waterman's N. Y. Tr. pages 1 and 2.

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bar to a subsequent suit. The judgment below must, therefore, be reversed on the last exception.

Judgment of reversal.

VAN RAUGH against VAN ARSDALN.

A discharge under the insolvent law of another state is no bar to a suit here, by a citizen of this state, for a debt contracted within it, and who has not, in any degree, come in, under the proceedings under the insolvent act.(a)

ASSUMPSIT by the indorsee against the indorser of a promissory note made in Rhode Island, and indorsed to

(a) From debts contracted in a foreign state between resident subjects or citizens, a certificate under either its bankrupt or insolvent laws, which would be there a discharge, is equally so in every other country. *Ballantine v. Golding*, 1 Cooke's B. L. 4th ed. 515; *Harris v. Mandeville*, 2 Dall. 256; *Potter v. Brown*, 5 East, 124. The effect, it is presumed, would be the same, were the parties natural born subjects of any other kingdom. But when the debt, though contracted in that country in which the insolvent obtains his certificate, is due to a subject of another power, resident within its territories at the time of incurring the debt, though it might have been proved against the estate of the insolvent, the courts in England, if the plaintiff has not come in under the foreign commission or proceedings, will not relieve in a summary way; *Pedder v. M'Master*, 8 D. & E. 609; *Anon.* 1 Anstr. 80; in Pennsylvania they will; *Millar v. Hall*, 1 Dall. 228; *Thompson v. Young*, 1 Dall. 294; *Donaldson v. Chambers*, 2 Dall. 100; *a fortiori*, if he has come in under the foreign commission. *Gorgerat et al. v. M'Carthy*, 1 Dall. 366. But if the debt be contracted in one country, with a resident citizen of it, a certificate subsequently obtained in another country, where the debtor at the time of its being contracted resided, will not, in the courts of the country where the debt was contracted, exonerate from it, (*Quin v. Keefe*, 2 H. Bl. 563; *Smith v. Buchanan*, 1 East, 6,) although, on the debt so contracted, a judgment has been obtained in the courts of the state where the certificate was granted, if the effect of such certificate there be purely local, and merely to emancipate the person of the debtor from imprisonment, and not to discharge the debt. *White v. Canfield*, 7 Johns. Rep. 117. In the courts of a country where a certificate is given, it is a discharge from debts previously contracted abroad. *Penniman v. Meigs*, 9 Johns. Rep. 325. Whether between subjects of the same nation residing in different countries, a certificate granted in one will, to a debt previously contracted in the other, be there a bar, does not appear to have received any express adjudication.

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to the plaintiff in this state, where he then was, and now is, a resident, by the defendant, whose established residence then was, and continues to be, in Pennsylvania, by the insolvent law of which state he was discharged in March, 1805. He did not include the plaintiff in the list of his creditors, nor mention the note in that of his debts, and the cause was at issue long prior to his exoneration. Upon these facts it was submitted to the court, whether the defendant could avail himself of the discharge in Pennsylvania in bar of the present suit.

KENT, Ch. J. This question arose in the case of *George B. Ewert v. William Coulthard*, which was decided in this court in January term, 1795; the plaintiff [*155] there was a citizen of this state, and the debt was contracted here; the defendant was a citizen of Pennsylvania, and pleaded a discharge under the insolvent act of that state, and the plea was overruled. Upon the authority of that decision, we are of opinion that the discharge stated in the case before us is no bar, and that the plaintiff is entitled to judgment. We give no opinion as to the operation of such a discharge, if the parties had been citizens of Pennsylvania, or if the debt had been contracted there, or if the plaintiff had given his assent to the proceedings under the insolvent law, or accepted any dividend of the defendant's estate; but, confining ourselves to the case before us, and to the antecedent decision, we declare only that a discharge under the insolvent act of another state, will not take away the right of a citizen of this state to sue here upon a contract made here, and which is binding by our laws.

LIVINGSTON, J. Supposing this question to be *res integra* here, (which must also have been the understanding of the counsel of both parties,) I had formed an opinion, and assigned my reasons at considerable length, in favor of the defendant; having no doubt, after a very careful exami-

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nation of the subject, that a *cessio bonorum*, under the laws of a state where the debtor has his permanent domicile, ought to operate as a discharge from his creditors in every part of the world. To this opinion, which is the result of much reflection and research, I still adhere; but being recently informed that a different decision has been made by this court, in the case mentioned by the Chief Justice, I do not think myself at liberty to dissent from the judgment just rendered.

Judgment for the plaintiff.[1]

[1] The effect and operation of the insolvent laws of a state upon contracts, to which the citizens of another state are parties, considered. *Van Hook v. Whitlock*, 26 Wen. 43.

In an action on a judgment, rendered in this court, the plaintiff is not estopped to show, that the judgment here was rendered on another judgment in a neighboring state, which latter judgment was rendered on a contract made, and to be performed there, before the passage of our insolvent law; and thus to avoid the operation of a discharge under that law which is pleaded here to an action on the last judgment. *Wyman v. Mitchell*, 1 Cow. 816.

A replication, setting out these facts, is not a departure; though the judgment, as declared on, purports to have been upon promises. *Id.*

Nor is the plaintiff, for that reason, estopped to deny, that it is, in fact, upon a judgment. *Id.*

The court decided that the act of congress relative to insolvent debtors within the district of Columbia, ought to have been specially set forth in the plea; for, as respects the union at large, it is a private act, of which the courts in the several states are not bound to take notice unless it be shown to them by pleading. It ought to have been recited in the plea, or so much of it as to enable the court to judge whether the discharge was made in conformity to it, and was well warranted by its provisions. If the rule were otherwise, and we were to take notice of the act as a public law of the United States, it would appear that the discharge affords no plea in bar of the action. *Wright v. Paton*, 10 J. R. 300.

Both parties resided in Madeira, and the debt was contracted there. By the law of Portugal extending to that island, the body of the debtor could not be arrested either before or after judgment, and the defendant in this suit moved to have an exoneretur entered on the bail piece. It was refused. The court said, "The remedy must be pursued according to the laws of the country in which the action was brought. If a foreign creditor pursued his debtor here, he is entitled to the more efficacious remedy provided by our laws for the recovery of debts." *Smith v. Spinola*, 2 J. R. 192.

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To an action of debt on a judgment in the supreme court of Connecticut, the defendant pleaded a discharge under the insolvent act of that state, by which, on making an assignment, he obtained a certificate which should operate to protect his person. The defendant resided in Connecticut; the plaintiff in New York, where the cause of action arose. The court said, "The certificate granted to the defendant in Connecticut, was not a discharge from the debt, but only from imprisonment. It was therefore limited in its object, and local in its effect, and the discharge was no bar to an action on the judgment. *White v. Canfield*, 7 J. R. 117.

The debt was contracted in Pennsylvania. Both parties resided there. The defendant obtained there a discharge under the insolvent law of that state from imprisonment, and from all liability of his person for any debt, before that time contracted. The plaintiff at the time of the discharge, and of the commencement of the suit in New York, was a resident of Pennsylvania. The court refused to enter an exoneretur; and Thompson, C. J., said, it is impossible to distinguish the case from *Smith v. Spinola*. *Secord v. Whale*, 11 J. R. 194.

Judgment having been obtained in Boston, on a debt contracted at Barbadoes, execution was issued, the defendant was imprisoned, and was discharged as an insolvent debtor. Being afterward arrested in New York, he was discharged on common bail, by the recorder, on the ground of having been formerly arrested and imprisoned for the same case. But the supreme court vacated the recorder's order, saying, that the discharge in Massachusetts was local only, and of the person, and not of the debt; that the plaintiff was not entitled to the remedy, which the laws of New York afforded, and that they did not, in that respect, take notice of an arrest abroad or in another state. *Pack v. Hosier*, 14 J. R. 346.

To an action on promissory notes made at Alexandria, the defendant pleaded a discharge under the act of congress for the relief of insolvent debtors, within the district of Columbia. A general judgment was rendered for the plaintiff. The court said, giving to this discharge all the effect which can possibly be claimed under the act of congress, it does not operate on the contract, but merely on the mode of enforcing it. It is a personal discharge of the defendant, nothing more, and must, from its very nature, be confined to the district of Columbia. *Whittemore v. Adams*, 2 Cow. 626.

An insolvent discharge obtained in this state, cannot be plead in bar of a suit brought in a court of this state, on a contract made in another state subsequent to the passage of the act under which the discharge is obtained, between parties not inhabitants of this state at the time of the contract, although, previous to the presenting the petition for the discharge, they become such inhabitants. *Witt v. Fillett*, 4 Wen. 467.

The courts in New York have considered the decision of the U. S. court in *Sturges v. Crowninshield*, (4 Wheat. 122,) as going no farther than to declare the discharge inoperative upon a debt existing antecedent to the passing of the law under which the discharge was granted. *Id. Mather v. Bush*, 16 J. R. 233; *Eicks v. Hotchkiss*, 7 J. C. R. 297.

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In the case last cited, it is expressly decided by the chancellor that "the discharge of the defendants under the insolvent act of this state is not a bar, even in this statute, to an action upon a contract made, or a debt contracted in Connecticut, between parties residing there at the time." "Valid discharges under an insolvent act must at all events be confined to cases of debts contracted after the passing of the act, and which are contracted within this state." *Hoke v. Hotchkiss*, 7 J. O. R. 297.

In the case of *M'Millen v. M'Neil*, (4 Wheat. 308,) the court laid down principles that go far to declare all discharges under state insolvent laws void. Our courts have confined the application of this decision to cases precisely similar to that before the U. S. court. The debt in that case was contracted in South Carolina while the parties were residents of that state. The defendant afterward obtained his discharge under the insolvent laws of Louisiana on a *caso bonorum*. He was subsequently sued in that state on the contract made in South Carolina, and interposed his discharge obtained in Louisiana, and it was declared invalid. *Witt v. Follet*, 2 Wen. 488.

The same principle was recognized in a subsequent case. The debt in the latter case, was not contracted in this state, but in Vermont, and before either party had become an inhabitant of New York; and on the principle of the cases referred to, the discharge of the defendant cannot be interposed as a bar to the plaintiff's action. *Wyman v. Mitchell*, 1 Cow. 318.

The article concerning voluntary assignments, (2 R. S. 15,) is declared to be a revival and continuation of the act of 1813, and the 30th paragraph, (2 R. S. 23, s. 30,) declares that a discharge obtained according to the provisions thereof, shall discharge the insolvent from all debts due at the time of the assignment, or contracted for before that time, though payable afterward, founded upon contracts made since the 12th of April, 1813. The 31st section relates to contracts to be made after the revised statutes should take effect as a law. *Ford v. Andrews*, 9 Wen. 312.

The 31st section relates to contracts to be made after the revised statutes should take effect as a law. By it to discharge is to exonerate the insolvent from all liabilities incurred by drawing or indorsing a promissory note or bill of exchange, or in consequence of the payment of the money by any party to such instrument, whether the payment be prior or subsequent to the assignment. *Id.*

This section is new in part; the act of 1813, (laws of 1813, p. 118, s. 11,) had gone so far in changing the law as pronounced according to the construction of the previous statute, as to exonerate by the discharge the indorser of a promissory note, though the note had not become due at the time of the discharge, and permitted the holder to come in for a dividend in the same manner as if the bill was due. *Id.*

This section extends the protection of the discharge to the maker as well as the indorser of a promissory note. *Id.*

The 32d section provides that a discharge under this article may be pleaded or given in evidence under the general issue and notice, in bar of any action upon any contract made since the 12th of April, 1813, &c., and in bar

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of any action upon any liability of such insolvent, incurred by making or endorsing any promissory note or bill of exchange, previous to the assignment, or in consequence of the payment by any party to such note or bill of the money secured thereby, whether such payment be made prior or subsequent to the assignment. *Id.*

The provision in the revised statutes that such discharge may be pleaded in bar of any action, incurred by the insolvent, in consequence of the payment by any party to such note, of the money thereby secured, whether such payment be made prior or subsequent to the execution of the assignment by the insolvent, applies to future contracts, and not to contracts made previous to the statute going into operation. *Id.*

The rule to discontinue, on receiving a plea of an insolvent discharge, is not a rule of course. *Field v. Brown*, 2 Cow. 503.

An insolvent discharge of a neighboring state, which exempts the person from imprisonment, but leaves the future acquisitions of the debtor liable to execution, relates to the remedy merely, not the contract, and is not of any force in this state. *Whittemore v. Adams*, 2 Cow. 626.

Imprisonment is no part of the contract. *Id.*

The *lex fori* governs the remedy. *Id.*

An insolvent law does not operate as a part of the *lex loci contractus*, unless it discharge the contract. *Id.*

Giving to this discharge all the effect which can possibly be claimed under the act of congress, it does not operate upon the contract, but merely upon the mode of enforcing it. It is a personal discharge of the defendant—nothing more; and must, from its very nature, be confined in operation to the district of Columbia. The *lex loci contractus* does not apply. *Peck v. Howie*, 14 J. R. 346.

The same principle has been repeatedly acted upon by this court, in relation to the statute of limitations of adjoining states. *Nash v. Tupper*, 1 Cal. R. 102.

Even where the contract arose, and both parties resided there. *Buggie v. Keele*, 3 J. R. 262.

Upon the principle, that the statutes under which they are granted are inapplicable, as a part of the *lex loci contractus*, but constitutes a part of the *lex fori* merely. *Peck v. Howie*, 14 J. R. 346.

The court gave effect to a New Orleans discharge, which extended both to the person and contract of the debtor. *Hicks v. Brown*, 12 J. R. 142.

And the principle of that case was recognized in another case. *Sherry v. Hyatt*, 1 Cow. 103.

Penny v. New York Ins. Co.

Penny and SCRIBNER *against* THE NEW YORK INSURANCE
COMPANY.

The charterer of a ship, at so much per month, cannot, on an insurance on his cargo, recover the extra sum paid during an embargo; such expenditure not being the subject of a general average, and not covered by any words in a policy.(a)

ASSUMPSIT on a policy of insurance on a cargo valued at 4,000 dollars. The vessel was chartered to the plaintiffs, for the voyage insured, at 400 dollars *per* month. The day after her homeward lading was taken in, an embargo was laid on, that continued two months and six days, at the expiration of which time it was taken off, and the vessel sailed on her voyage home. Whilst thus on [*156] her return, *the assured, having received notice of the imposition, but not of the removal, of the embargo, made their abandonment, which was not accepted, and shortly after the vessel safely arrived. The plaintiffs originally claimed for a total loss, according to their valuation in their policy, and also 1,600 dollars for four months' hire of the vessel from the period of her first commencing to load, during her detention under the embargo, and until the final delivery of her loading in New York. On the principal of these demands, an account was stated between the parties, and a verdict taken in favor of the plaintiffs for the balance, subject to the opinion of the court whether it should stand, be reduced to any other sum, or entered for the defendants. The plaintiffs, however, being, previous to the argument, informed of the decision of the court of errors in the case of *Church v. Bedient and others*, [1]

(a) S. P. as to insurers on the ship, who are not liable for wages and provisions during an embargo. *M'Brice v. Marine Ins. Co.*, 7 Johns. Rep. 431. Suppose an abandonment of each separate interest in ship, freight, and cargo, during the embargo; a long continuance of it, and a subsequent earning of freight; on whom, according to the doctrine of *M'Carthy v. Abel*, 5 East, 293, will the wages and provisions, after the abandonment, be charged?

Oaines' Cases in Error, 21,) relinquished the idea of recovering for a total loss; yet they contended they were entitled to compensation to the amount of the money paid under the charter-party during the existence of the embargo.

Colden, for the plaintiffs. We certainly are authorized to demand from the underwriters a compensation to the amount of the money paid for the hire of the vessel whilst embargoed. This is a damage within the words of the policy. We are to be kept indemnified from any loss by reason of restraints or detentions. The detention was at a critical time; when ready to sail. That, therefore, an injury has been sustained, cannot be disputed. It cannot be borne by the insurer on the ship, nor by him on the freight. Must it not, then, fall on the underwriter on the cargo? for it was to bring home the cargo that it was incurred. It may be said that the property is not injured. But that is not the criterion. If the assured has been damnified, it is enough to entitle him to ask for reparation. In the case of ransom, the property is not deteriorated, yet the underwriter is liable. No objection can be made as to the nature of the claim, because an account is annexed to the case, for the express purpose of having it modelled as the court may think fit; and under a count for a total loss, a partial one may be recovered.

**Hoffman*, contra. This is an attempt to charge [*157] the underwriters on the cargo with expenses due on the freight. It is no argument to say, because it is not to be exclusively borne by ship or freight, it must, therefore, be thrown on the cargo. The first claim was for a total loss. Finding this could not be supported, they come now, and ask the court to make that a ground for a partial loss which can, at most, be only a subject of general average. To adjust this the court have no data, and must step out of the policy, the pleadings, and the case. No particular interest

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can be charged with the expenses of detention. A doubt may be entertained how far those incurred in the present instance are even a subject of general average. The whole results into this; the party has, under his contract, paid some hundred dollars more in one case than he would in another.

Harrison, in reply. The expenses incurred by detention, where not subjects of general average, have been usually considered as charges against the freight. This, however, is a case *sui generis*, distinguishable from all to be found in the books. Where the freight is liable exclusively, a specific sum is to be paid for the carriage of the articles, and whether they arrive soon or late, is immaterial to the owner of the goods, for he has nothing more to pay than his freight. When, therefore, he applies to the underwriter, the answer is, you are not the sufferer; the freight has paid it. This does not apply here. Under this charter-party, the owner of the goods is the sufferer by the detention, for he pays so much more in money as the vessel was detained in time. This, then, is a loss on the cargo. The case, it is true, is novel. But considering a policy of insurance as a contract of indemnity, the plaintiff must, on the principles established as law, be entitled to compensation. Supposing, however, this is matter of general average, there are data to show something due, and then a new trial may be directed to ascertain how much.

LIVINGSTON, J., delivered the opinion of the court. The subject insured not being abandoned until it was in safety, that is, until three days after the embargo was removed, the plaintiffs, although ignorant of its liberation, cannot, consistently with the judgment of the court for the [*158] correction of errors, *in *Bedient and Kimberly v. Church*, recover as for a total loss; nor can we, on the facts here disclosed, ascertain what is due to them for a partial loss, admitting a demand of that kind to be well founded. If entitled to any thing, it is to the defend-

ants' proportion of a general contribution towards reimbursing them for a sum which, as owners of the cargo, they paid in consequence of certain extraordinary expenses that accrued during the embargo; but to make a calculation, we should know the value of sloop, freight and cargo. This not appearing, it is impossible so to modify the verdict as to do complete justice. If this cannot be done, it is said, that as this suit was brought in consequence of a former judgment rendered by this court, which has since been reversed, the parties should be permitted to go to a new trial to ascertain the value of these different subjects, and the extent of the defendants' liability on the principle of a general contribution. This is reasonable, and I should readily accede to it were the defendants chargeable with any thing on this policy; but thinking otherwise, it is our duty to arrest the suit here, and not expose them to the expense of further litigation. It seems to have been conceded on the argument, that the plaintiffs, having contracted for freight by the month, were bound to pay even for the time the vessel was embargoed. This may be so; but I am inclined to think that a detention of this kind, by a foreign prince, suspends the contract, whether freight be payable for the whole voyage, or by the month. Demurrage is certainly not payable during such restraints, and Pothier, (N. 85, tom. 2, p. 399,) in his treatise on charter-parties, says expressly, that "the owner of a vessel hired by the month, is not entitled to freight during an embargo." Without, however, deciding a point which has not been made, and admitting the sum thus paid to have been justly due, the defendants cannot be called on to refund any part of it. This will necessarily lead to an inquiry, whether the expenses arising out of a state of embargo are to be defrayed by common contribution, or whether they be subjects of a particular average. That they are of the latter description, has been decided, after solemn argument, by the whole court of king's bench in the case of *Robertson v. Fear*, 1 D. & E. 127, where it was held that wages and

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provisions, during an embargo, were not covered [*159] by a policy on the ship. This *may be supposed inconsistent with our decision in the case of *Leavenworth v. Delafield*, 1 Caines' Rep. 578, see note(a,) ib. 578; and, therefore, as not forming a rule in the present case. But the two decisions are perfectly reconcilable; otherwise, for the sake of uniformity, the latter should be followed, unless manifestly incorrect, however respectable the other may be. There is an evident distinction between a detention by capture and an embargo. In the former case, the charter-party is dissolved, and the captain (who is generally agent of all parties, to act for the best under every misfortune) reclaims both vessel and cargo, and without being under contract, or obliged so to do, retains the crew, for the purpose of preventing an entire loss, and pursuing the voyage if the property be acquitted; whereas he might dismiss them at once, and the underwriter be called on for a total loss. The expenses, therefore, incurred by a claim of this nature, being evidently for the general benefit, if not impliedly at the general request, and not the effect of previous stipulation or contract, which is at an end by the capture, it is but reasonable they should be defrayed in the same way. Ricard, in his treatise on the commerce of Amsterdam, assigns nearly the same reason for making a general average of wages in case of capture, and a particular average of them during an embargo. (P. 279.) "The wages of a ship," says he, "detained by an order of state, shall not be brought into general average as in case of capture; because, in the latter case, the crew remain to take care of the vessel whilst she is reclaiming, and these charges are occasioned with the sole view of preserving the ship and cargo for the proprietors; but there is no room for such pretence in the case of an embargo; as the sovereign who lays it neither claims the ship or cargo, but only for political reasons prevents their immediate departure. Therefore, it cannot be said that the ship's company remained on board to prevent an entire loss." The French ordinance

declares that such charges, during an embargo, shall be reputed as general average, if the vessel be hired by the month, but if freighted by the voyage, they shall be borne by her alone. Pothier, in his treatise above referred to, assigns a reason for this distinction, which is not very satisfactory, and, therefore, I shall not repeat it. From Emérigon, vol. 1, 631, we also learn that there are foreign writers, *although there be a diversity of [*160] opinion among them, who hold all expenses consequential on an embargo as particular averages. In this way, a person who has insured one species of property can never be called on to make good a particular damage which may have happened to another, nor exposed to a loss not within the risk which he has assumed. On what pretence, then, can an owner of a cargo call on its underwriter to make good any extra freight he may have paid for the carriage of it? He does not undertake that the voyage shall be short or uninterrupted, but only that the goods shall eventually arrive safe; and whether the transportation cost more or less, is a matter with which he has nothing to do. Whether the vessel encounter a tempest, or be embargoed in her way, (if no abandonment be made during the detention,) is to him of no consequence, so that the goods finally arrive, as was the case here, without damage, at their destined port. I am, therefore, for adopting the English rule in the case of an embargo, not on the ground of authority, the decision being posterior to the revolution, but as the most reasonable; the most conformable to the understanding of the different classes of underwriters; the best calculated to prevent confusion and embarrassment, and the most likely to throw upon each the loss which the particular subject insured by him has sustained. Whether, therefore, the present plaintiffs were liable for freight or not during the embargo, my opinion is, that they have no claim on the defendants, who underwrote their goods,(a)

(a) *S. P. Barker v. Phoenix Ins. Co.*, 8 Johns. Rep. 307.

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for any part of it, and that judgment be rendered accordingly.

Postea to the defendants.

STRONG and UDALL, Guardians of the person and estate of
NICOLL, an infant, *against* **SMITH**.

A *waiver* may be taken to any number of facts, if the whole of those facts make only one point necessary to a defence or claim; for a point in law is not confined to a single fact.

TRESPASS for breaking the plaintiff's close at Islip, in the county of Suffolk, to which the defendant pleaded, 1. That the *locus in quo* was the freehold of the trustees of the freeholders and commonalty of the town of Huntington, by whose command he entered; 2. That the trustees being seised in fee of the *locus in quo*, demised to him for a year.

Replication to the first plea, that the close was the freehold of William Nicoll, in the possession of the [*161] plaintiffs as *guardians, and traversing the freehold of the trustees. To the second plea, that at the time when the trespass was committed, William Nicoll was seised of the premises in his demesne as of fee, in the actual possession of the plaintiffs, traversing both the seisin of the trustees, and the demise to the defendant.

Rejoinder to the first plea, taking issue on the *locus in quo* being the freehold of the infant. To the second, a demurrer, assigning for cause, that the plaintiff had traversed "two distinct and material allegations contained in the said second plea, to wit, the seisin in fee of the trustees of the freeholders and commonalty of the town of Huntington, and also the lease and demise which is alleged in the said second plea to have been made by the trustees of the freeholders and commonalty of the town of Huntington, to him, the said Silas Smith, and, therefore, the said traverse is multifarious, double," &c.

Sanford, in support of the demurrer. Every traverse should be to a single point. Co. Litt. 126, a. Bac. Abr. tit. Plea and Pleadings, H. s. 5. This principle shows the traverse to the second plea to be bad. *Crogate's Case*, 8 Rep. 66, is, in the last resolution, a strong authority for the general position that all issues must be single. The plaintiffs have traversed the whole plea, and had we gone to trial, we must have established the seisin and the demise, each of which is a several, independent fact, traversable at the election of the plaintiff. *Moor v. Pudsey*, Hard. 316. The same doctrine is in *Read's Case*, 8 Rep. 24, where it is expressly ruled, that when the defendant justifies through a stranger, the plaintiff may traverse the seisin or demise, at his election, It does not say both. In the books of entries no precedent of such a traverse is to be found.

Riggs and Rauliff, contra. The traverse is the exact denial of the plea; and if the one be double, the other must be equally so. The result will be, supposing the demurrer good, that judgment must be for the plaintiffs, according to the well known rule, that on demurrer, judgment must be against him who has committed the first fault. It is true, that a traverse, like an issue, must be to a single point; but a single point is not a single fact; for many facts may go to make up one entire, or single point of defence. **Robinson v. Raley*, 1 [*162] Burr. 316. *Bolls v. Purvis*, 2 Bl. 1028. Com. Dig. tit. Pleader. E. 2. Here the point of defence is, the close being the freehold of the defendant. Both the facts which make this out constitute one point. Did the negation of either fact, singly, destroy the defendant's title, then we had it in our power to traverse that and admit the other. But as the denial of both is necessary to do away his point of defence, that the freehold is his, we, in traversing both, confine ourselves to one single issue.

Sanford, in reply. The rules of special pleading are by
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admissions, and avoiding to come to a single point. The doctrine contended for would destroy the whole system. To make the case in *Burrows* like this, there ought to have been a traverse to each fact stated in the plea.

THOMPSON, J., delivered the opinion of the court. It is undoubtedly a sound and established rule in pleading, that a traverse is not to be multifarious, but to a single point. This, however, does not determine what shall be deemed a single point within that rule. It cannot be a single fact. The rule we think well illustrated and exemplified in the case of *Robinson v. Raley*, 1 Burr. 316. That was also an action of trespass, and a number of pleas interposed. The replication traverses one of the pleas in the following manner: "Without that, that the cattle were the defendant's own cattle, and that they were *levant* and *couchant* upon the premises, and commonable cattle." To this there was a special demurrer, assigning for cause, that the replication was multifarious. The demurrer, however, was overruled, Lord Mansfield saying, "'Tis true, you must take issue upon a single point, but it is not necessary that this single point should consist only of a single fact. Here the point is the cattle, being entitled to common; this is the single point of the defence; but in fact they must be both his own cattle, and also *levant* and *couchant*, which are two different essential circumstances of their being entitled to common, and both of them absolutely requisite." Thus, in the present case, the single point is the defendant's right to enter the *locus in quo*. This right is set up as resulting from the two distinct facts of the seisin of the trustees, and their demise to the defendant, both of which were essential to constitute the right. The seisin alone of the trustees would have given [*163] no right to the defendant; neither would *the demise of itself have imparted any, unless the trustees were competent to make it. If the defendant, therefore, had traversed only one or the other of these facts, he

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would have tendered an immaterial issue, the trial of which would not have decided the merits of the case between the parties. It is true, that in some of the very old cases, the court say that any part of what the defendant makes his title is traversable, as in *Moors v. Pudsey*, Hard. 317, exemplifying the very case now before us, it is laid down, where in trespass the defendant alleges a seisin in fee in a third person, and a demise to himself, the plaintiff may traverse either the seisin in fee or the demise, at his election. But in no case, which we have seen, is it said that he may not traverse both. Admitting, however, the ancient rule to have been, that he must traverse either the one or the other, we should consider that rule as altered by the decision of *Robinson v. Raley*, above cited. The distinctions there made by Lord Mansfield, appear to us to be founded in good sense, and to warrant us in saying that although in the present case the seisin of the trustees, and the demise to the defendant, are two facts, yet they make but one point, and the traverse is, of course, well taken.

LIVINGSTON, J. The merits of this case lie in a very narrow compass. A traverse, it is not denied, must be of a material point; so, neither can a plea contain a multiplicity of distinct matters, for every issue (and that applies to plea as well as to a traverse) must be single. By this, however, it is not intended that a plea shall consist of only one matter of fact, but it may contain as many as may be necessary to constitute one defence. 1 Burr. 316; 2 Black. 1028. A special plea can hardly be found, that is not made up of a variety of facts; all, however, tending to, and making parts of, the same point of defence. Here the point was, the defendant's right to the premises; but, to make out a lawful possession in him, it became necessary to state the several circumstances which constituted it, to wit, the seisin of the trustees, their demise, and his entry under it. On this plea the plaintiffs might have taken issue; but they preferred setting up a seisin in their ward, which being a

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[*164] matter different from that relied on by the *plea, it became necessary to traverse the point of defence contained in the latter. In such cases, the only rational rule must be, that the plaintiff may traverse all, any or either of the material facts which compose the point of his adversary's defence. Litt. 881. This will not render the pleadings more complicated or intricate than if he puts them immediately in issue, by a total denial of them. A contrary rule, by driving the party to an election of traversing only one of the circumstances, would produce unnecessary hardship. Whatever is traversable, and not traversed, is admitted. Why, then, by this mode of proceeding, compel either party to admit several important facts which the other may not be able to prove? Thus, if the demise here had only been traversed, the seisin of the corporation would have been conceded, and *vice versa*.

Crogate's Case (8 Rep. 66,) did not turn at all on the point before us; and *Read's* (6 Rep. 24,) only establishes that the seisin, or demise, may be traversed; but how far they were both traversable, was not before the court.

The decision of *Jones v. Kitchin*, (1 B. & P. 76,) which was not cited, may at first appear favorable to the defendant, but it was founded on the authority of *Crogate's Case*, and both proceeded on a ground entirely different from that which is here taken. In both cases it became a question how far a replication, or plea *de injuria sua propria absque tali causa*, was proper where the adverse party had "asserted any right or interest in land." It was decided in the negative; but what Lord Chief Justice Eyre says, in giving the opinion of the court, is deserving of notice. After reading the resolutions in *Crogate's Case*, he adds: "Thus the rule is distinctly laid down, that *de injuria propria* is only to be received where the defence set up is matter of excuse, and not where it asserts any right or interest. But the reason is not because it puts two or three things in issue, for that may happen in every case where the defence arises out of several facts, all operating to one point of excuse. The

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reason is, because this plea is only allowed where an excuse is offered for personal injuries, and not even then if it relates to any interest in land." The counsel, too, who argued against the plea in *Jones v. Kitchen*, admitted, "that if the several matters put in issue make together but *one defence, they may be thus all put in [*165] issue together by *de injuria sua propria*." If so, why, by parity of reasoning, may not the same matters be traversed, if they really form but one defence? The two following cases, which were not mentioned at bar, show that this may be done; but, were we without authority, the thing is too reasonable not to be permitted, nor can any one inconvenience flow from it.

In *Wood v. Holland*, (Styles, 344,) Rolle, Ch. J., held that the descent, as well as the disseisin, might have been traversed.

In *Brake v. Kent*, (Carth. 125,) an executrix pleaded several judgments and no *assets ultra*. The plaintiff replied they were kept on foot by fraud. The defendant, maintaining his bar, traverses that all or any of the judgments were kept on foot by fraud. This was held good; and yet, on the reasoning of the defendant here, the traverse should have been confined to only one of the judgments.

I have no doubt the replication is good; but were it not, the plea, for the very objections made to the traverse, would also be bad; so that, in either case, the plaintiffs must have judgment; "for it would be very hard," to borrow the language of Lord Chief Justice *Willes*, (Willes, 410,) "to give judgment against a plaintiff, because he has only traversed literally the defendant's plea; for, if the issue be wrong the first fault is in the defendant."

Judgment for the plaintiffs.

Pinder v. Morris.

PINDER *against* MORRIS.

If a defendant has, *bona fide*, paid debt and costs to a plaintiff, the court will order satisfaction to be entered on the judgment obtained in the suit, though the costs of the plaintiff's attorney may not have been paid, for he has no *lien* on the debt while in the defendant's hands, unless he gives notice not to pay over, or there be collusion to defraud him.

WILLIAMS moved to set aside the judgment and execution in this suit, or to enter up satisfaction on the judgment obtained therein on a sealed note, upon production of a written discharge from the plaintiff, containing a complete release of all demands, costs, &c., and a receipt for the balance due, which the defendant swore he paid in full consideration of the note, and without knowing that any third person had an interest therein.

Tiffany objected to the application, because the attorney had a *lien* on the debt for his costs, and might, by this species of settlement, be cut out. He contended, also, that the rule would be inefficacious, as the judgment entered was against Morrison, and the order of court would be in a suit where the defendant was named Morris.

[*166] **Per Curiam*. From the case of *Welsh v. Hole*, (Doug. 238,) sanctioned by *Mitchell v. Oldfield*, (4 D. & E. 123,) and *Read v. Drupper*, (6 D. & E. 361,) if the defendant pay to the plaintiff debt and costs, after notice from the attorney of the plaintiff not to do so, he pays the costs, in his own wrong, and Lord Mansfield said, the court could not go further.(a)

If the adverse party applied to the court to cancel the judgment by a set-off, then the court would take care that the attorney's bill should be paid. In the case of *Spencer v. White*, April term, 1799, the court qualified the right of the plaintiff's attorney, even in the case of a set-off. The

(a) See *Watson v. Depeyster*, 1 Caines' Rep. 67, n. (a.)

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present motion must, therefore, be granted, as there is no pretence of notice to the defendant, or of any collusion between him and the plaintiff, to deprive the attorney of his costs. As to the variance between the names, this is a rule granted in the cause of *Pinder v. Morris*, and it will never be an authority for entering satisfaction on a judgment in one against Morrison.

Motion granted.[1]

[1] Therefore, the rule of the court is satisfied by delivering a writ to the sheriff on the 15th, returnable on the 19th of the month. *Oilleopic v. White*, 16 J. R. 117.

Where the original action is in the common pleas, if the bail remove out of the country, the action on the recognizance may be brought in the supreme court. *Davis v. Gillet*, 7 J. R. 318.

After judgment against the bail, if the principal has been taken in execution the plaintiff cannot issue a *ca. sa.* against the bail, or if the bail have been taken in execution, he cannot proceed against the body of the principal. *Smith v. Rosecrantz*, 6 J. R. 97.

The bail are not discharged by the plaintiff's electing to sue out a *fi. fa.* in the first instance: and if a part of the debt be levied on the *fi. fa.*, he may, notwithstanding, resort to the bail for the residue. *Olcott v. Lilly*, 4 J. R. 407.

A *ca. sa.* against the principal must not only be sued out, but must be actually returned, *non est inventus*, and filed before the plaintiff can proceed to charge the bail. *Pearseall v. Lawrence*, 3 J. R. 514.

It is not necessary that there should be eight days between the teste and return of the *ca. sa.* against the principal, where the proceedings are by bill. *Cook v. Campbell*, 8 Cal. R. 322. *Carmer v. Weeks*, 3 J. R. 246.

Taking the principal on a *ca. sa.* is a discharge of the bail, and no exoneretur need be entered. *Milner v. Green*, 3 J. C. 283.

A sheriff will be discharged from an attachment for not bringing in the body, where special bail hath been put in, but the bail piece has been lost in its transmission to the clerk's office. *The People v. Shoemaker*, 2 Wen. 253.

A sheriff returns *cepi corpus* to a *cap. ad resp.* the deputy sheriff who serves the writ, becomes special bail, of which notice is sent by mail, but not received by the plaintiff's attorney: the latter, eighteen months afterward, rules the sheriff to bring in the body of the defendant, and moves for an attachment against him; the deputy and sureties having in the mean time become insolvent; the court refuses to grant the attachment. *Jourdan v. Hawkins*, 17 J. R. 35.

The rule on the sheriff to bring in the body of the defendant cannot be served until twenty days after the time, in which the writ is returnable, have

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expired; and it seems, that the rule ought not to be entered before the time. *Goss v. M'Naus*, 15 J. R. 181.

All the proceedings, until the attachment, including the rule, must be entitled in the original cause. *The People v. Ferris*, 9 J. R. 160.

Where the defendant has put in bail to the action, although the bail may be insufficient, the plaintiff cannot proceed against the sheriff. *The People v. Stevens*, 9 J. R. 72.

It seems, that if the plaintiff delays for a length of time, to call on the sheriff for bail, it will discharge him. *Id.*

If the sheriff does not return the writ within twenty days after notice of the rule for that purpose, an attachment may issue against him immediately; but it is otherwise in the case of a rule to bring in the body. *Franklin v. Lamb*, 1 J. R. 508.

The sheriff must have twenty days notice of the rule to bring in the body, before a motion for an attachment against him. *Id.* *Stewart v. Williams*, 2 J. C. 71; *M'Gomet v. Armstrong*, C. C. 50.

Where the rule for bringing in the body had expired, but no trial had been lost; the defendant had sworn to merits and tendered the full amount in money, as security, which was refused, and the bail had since justified, the court denied a motion for an attachment against the sheriff, on payment by him of the costs of the rule to show cause, and of the plaintiff's application. *Post v. Van Dine*, 1 J. C. 412; S. C., C. C. 106.

There is no distinction between proceedings against bail and other joint debtors, and the plaintiff may proceed and declare against both, under the statute, as in ordinary cases when one defendant is taken and the other not found. *Stewart v. Patten*, 1 H. 38.

In an action upon a recognizance, the sheriff returned upon the writ, "one of the defendants taken and the other not found." The plaintiff, under the statute relating to joint debtors, having declared against both bail, a motion was made in the name of the defendant not taken for an exoneration upon the bail piece in the original suit, with the avowed object of making it available to both; but the motion was denied. *Id.*

The surety in a bond to the sheriff for the appearance of S. on a *capias ad resp.* pleaded *comperuit ad diem*: held, a replication, that S. was an infant and did not appear by guardian, was void. *Potter v. Rainsford*, 1 Hill, 323.

Where a sheriff, on being served with an attachment for not bringing in the body of a defendant, pursuant to a rule of the court, procured a person (on promise of indemnity) to put in special bail in the original suit; held, that the sheriff could not maintain an action on the bail bond; for, there being an appearance according to the condition of the bond, the defendant might plead *comperuit ad diem prout patet, &c.* *Mathison v. Furber*, 19 J. R. 202. N. Y. Dig., vol. 1, p. 230, *et seq.*

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PECK *against* M'ALPINE.

Adjourning a justice's court for more than six days, cannot be alleged for error by him who has requested it.

ON *certiorari*, the plaintiff relied on the justice's having adjourned for more than six days.

Per Curiam. It appears to have been so done on his own request; he is therefore estopped from alleging it for error.

SHEPHARD *against* WATROUS.

A submission to arbitrators is a good consideration for a note. If, in an action for words, the matter in dispute be left to arbitrators, it cannot, in an action to recover a sum they awarded, be shown that the words were not actionable.

ASSUMPSIT by the payee against the maker of a promissory note for two hundred dollars, given under the following circumstances:

The defendant, while under arrest at the suit of the plaintiff, in an action of slander, made the note in question, to be delivered into the hands of certain persons, who were to decide upon the subject of controversy between them, and in consequence of this arrangement, was instantly discharged from custody; after which the arbitrators returned the note to the plaintiff indorsed 100 dollars.

At the trial, the defendant offered to prove that in the suit on which he had been originally arrested, the plaintiff had no cause of action.

*The judge, deeming this evidence inadmissi- [*167]

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ble, charged for the plaintiff, in favor of whom the jury found for the sum indorsed by the arbitrators.[1] The case now came up, on a motion for a new trial, on account of misdirection at the circuit.

[1] An award cannot be impeached in an action on the ground that it is against law. *Mitchell v. Bush*, 7 Cowen's Rep. 185.

The award may be impeached in equity.

To impeach an award in equity, there must be a corruption, partiality or gross misbehavior in the arbitrators, or some palpable mistake made by them in law or fact. *Schenck's adm'r. v. Cuttrel*, 1 Green's Ch. Rep. 297.

A mistake in the law must be a plain one, and upon some material point affecting the case. A mistake in the fact must, in general, be such as the arbitrator himself would admit. *Id.*

If the arbitrators receive the statement of one of the parties as to material facts, without proof, when objection is made by the adverse party, it is an impropriety so gross as to call for the aid of the court. *Id.*

That the arbitrators, after hearing the evidence, and while considering their award, called both the parties before them, and asked one of them questions concerning the case, without the permission or consent of the other, or objections made by him, constitutes no valid objection to the award. *Id.*

An award cannot be impeached, except for fraud or partiality in the arbitrators. *Fitzpatrick et al. v. Smith*, 1 Desau. 245.

Awards cannot be impeached or set aside, unless for corruption, partiality, or gross misbehavior in the arbitrators, or for some palpable mistake of the law or the fact. *Herrick v. Blair & Blair*, 1 Johns. Ch. Rep. 101; *Shermer v. Beale*, 1 Wash. 11; *Pleasants et al. v. Ross*, 1 Wash. 156.

An award made by arbitrators, acting under an order of the court, is conclusive on the party, as to questions submitted to the arbitrators, unless liable to objection for partiality, corruption, gross misconduct, or palpable ignorance of the law. *Alwyn v. Perkins et al.*, 3 Desau. 297.

Affidavits may be introduced to show partiality or misbehavior in the arbitrators, but not mistakes in law or fact. *Pleasants et al. v. Ross*, 1 Wash. 156.

An award ought not to be set aside, either in a court of law or equity for a mistake in the judgment of the arbitrators, unless it be very palpable. A mere difference of opinion between the court and the arbitrators, in a doubtful case, not being sufficient to authorize such interference. *Morris et al. v. Ross*, 2 Hen. & Mumf. 408.

The degree of uncertainty, required to avoid an award of arbitrators, is the same required to avoid any contract. *Akely v. Akely*, 16 Verm. Rep. 450.

Where a party referred matters in contest between himself and another, to arbitration, and, after the award was made, he had full time and opportunity to examine it, and then gave his bond for the amount awarded against him.

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Russel, for the defendant. We shall rely on the want of consideration, and the manifest oppression, from the circumstances under which the note was given. Between

Held, that he could not afterwards have relief upon the ground of errors in the award. *Sharpe v. King*, 3 Iredell's Eq. Rep. 402.

No calculations or grounds for an award, which are not incorporated in it, or annexed to it at the time of delivery, are to be received as reasons or grounds to avoid it. *Faylen's adm'r. v. Nicholson*, 1 Hen. & Munf. 66.

An award will not be set aside in equity on account of an omission by the arbitrators to act upon part of the matters submitted, unless that omission shall have injured the complainant. *Davy's ex'rs v. Shaw*, 7 Cranch. 171.

An award is not the less certain and final because the arbitrators refer to a report previously made by a commissioner in chancery, and declare, in general terms, their concurrence with it, instead of specifying the particulars or substance thereof in the award itself; nor because they submit to the court the propriety of their award in point of law, and, as a guide for the court in deciding upon it, state the grounds and reason thereof. *Brickhouse v. Hunter et al.*, 4 Hen. & Munf. 363.

Where a dispute, concerning the division of a tract of land under a will, was submitted to arbitrators in general terms, and an award was made stating that, "from the proofs adduced to the arbitrators, from the tenor of the will, and evident intention of the testator," one of the parties was entitled to a certain number of acres, to be divided from the rest by a specified line, and the other the residue of the tract; this award, (being free from objection in other respects,) was held to be valid, notwithstanding the line established by it, was different from the dividing line mentioned in the will. *Hollingsworth v. Lupton et ux.*, 4 Munf. 114.

In a suit in chancery to set aside an award, on the ground of a mistake of the arbitrators, the defendant, by his answer, consenting that the award may be opened, and an account taken, (if the complainant choose,) from the beginning, but at any rate, as to ascertain particulars specified by himself; he is bound to abide by a statement thereupon made, by a commissioner of the court, refusing to open the account on his motion from the beginning, and professing only to correct the mistake alleged by the complainants, (notwithstanding such mistake be not proved independently of the report of the commissioners,) no evidence having been offered by the said defendant, as to the particulars specified by him, and no objection to such report appearing, except that the account was not opened from the beginning. *Scott's ex'rs v. Trent et al.*, 4 Hen. & Munf. 357.

Where arbitrators, after a witness had been sworn and examined, and they were left alone to deliberate on their award, called the witness again, and without the knowledge or presence of the parties, examined him as "to matters material to the controversy, on which he had before given testimony,

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maker and payee the consideration is always open to inquiry; and as, from the case, it appears none passed to the defendant, the instrument cannot support an action. *A*

but about which the arbitrators differed as to what the witness did testify on the former hearing;" an injunction to stay a suit at law, on the arbitration bond, for the performance of the award was refused. *Herrick v. Blair & Blair*, 1 Johns. Ch. Rep. 101.

Where a cause is referred by consent of parties, under an order of court, and the referees, who were two lawyers and a merchant, were to decide all questions in dispute between the parties, as well matters of law as of fact; and a question of law, as to a will, put in issue by the pleadings and discussed before the referees, was decided by them; it seems the court of chancery will not interfere with the award, unless a gross and palpable mistake is shown. *Roosevelt et al. v. Thurman*, 1 Johns. Ch. Rep. 101.

This court will not grant an injunction to stay an action at law on an award, on the ground that the plaintiff was surprised by the principal witness for the defendants, swearing falsely before the arbitrators, and that he could have proved the falsehood of the testimony, if the arbitrators would have adjourned the hearing for that purpose, which they refused to do, though requested by the plaintiff, who offered to enlarge the time of making the award. *Woodworth v. Van Buskirk and Slocum*, 1 Johns. Ch. Rep. 432.

The court will correct a mistake of an extra judicial nature, in an award of arbitrators, and decree a performance of it in specie. *Bouck v. Wilber*, 4 Johns. Ch. Rep. 405.

As where there was a dispute between the plaintiff and defendant, as to fifty acres of land, in the possession of the defendant, and the partners agreed to submit the matter to arbitrators, who were to appraise the value of the land, and the defendant was to pay the amount of the appraisement to the plaintiff, who was to execute a release of the land to the defendant; and the arbitrators, in their award, having appraised the fifty acres in the possession of the defendant, through a mere clerical mistake, in describing the land, stated the bounds erroneously, so as to include about one acre only of the land in the defendant's possession. It was decreed that the award be corrected according to the truth of the fact, and a specific performance thereof accordingly. *Id.*

In the case of an award, this court will not interfere, unless there has been fraud, imposition, or mistake. *Shephard v. Merrill*, 2 Johns. Ch. Rep. 276.

Where the matter submitted was what damages the one party or the other was to pay, on the surrender of a lease, and the arbitrators awarded a sum to be paid by the lessor to the lessee, but did not take into consideration the rent payable at the next quarter day, considering that matter as not in controversy, or submitted; nor was it mentioned or brought before them by the parties; it was held, that there was no mistake in the award. *Id.*

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note cannot be given upon the contingency of its becoming valid by what arbitrators may decide. The being discharged from custody will not, did it even appear a part

When there is no charge of corruption or misconduct in arbitrators, and the award on the face of it is final, nothing deors the award can be pleaded or given in evidence to invalidate it. *Todd v. Barlow*, 2 Johns. Ch. Rep. 551.

An award will not be opened or set aside, on the allegation of the discovery of a receipt which had been lost or mislaid, so that it could not be produced before the arbitrators to show a payment, unless under very special circumstances, and satisfactory proof of all due efforts to discover the receipt before the hearing, or to supply its loss, and of its discovery since the award. *Id.*

If there is no charge of corruption, partiality or undue practice in the arbitrators, an award will not be set aside, however unreasonable or unjust it may be. *Id.*

An agreement to submit a question to arbitration will not be enforced in equity. *Tobey v. The County of Bristol*, 3 Story's Rep. 800.

But an award under such an agreement may be enforced. *Id.*

An agreement to submit is, both at law and in equity, reversible before the award is made, but not afterward. *Id.*

It cannot be made irrevocable by any agreement of the parties. *Id.*

An agreement to refer, without saying more, how and when, and to whom the submission is to be, can hardly be deemed anything more than an imperfect and inchoate agreement. *Story, J. Id.* 818.

An agreement to refer cannot be set up as a defence to a suit either at law or in equity. *Story, J. Id.* 819.

An award was set aside because it did not make a final settlement between the parties, and placed one party wholly in the power of the other, by fixing no time for the payment of the debt, and placing the mortgaged property in the hands of the mortgagor, to enjoy the profits indefinitely. *Hatter v. Etnaud*, 2 Desau. 571.

An award was set aside as to that part which exceeded the submission. *Gibson et al. v. Broadfoot*, 3 Desau. 11.

If the arbitrators will certify the principles on which they proceeded, the court will set aside the award, if the principles be incorrect. *Pleasants et al. v. Ross*, 1 Wash. 156.

If arbitrators refuse to hear evidence pertinent and material to the controversy, it is such a misconduct as will vitiate the award. *Van Cortlandt v. Underhill*, 17 Johns. Rep. 405.

As where persons chosen by the parties to a lease, to appraise the value of the mills and buildings erected on the premises during the term, refused to hear evidence offered by one of the parties of the original costs of the buildings, this was held to be a sufficient cause for setting aside the award. *Id.*

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of the consideration, make it better, for the note was previously made. A promise to pay money in consideration the plaintiff would withdraw a bill in chancery, is not suffi-

So, partiality and corruption in either of the arbitrators, or the suppression and concealment of material facts by either of the parties, if the knowledge of such facts would have produced a different result, are sufficient causes for setting aside the award. *Id.*

So, it seems, if the assessment of damages, or the appraisement of the arbitrators, be so enormous and exorbitant as to induce a belief that the arbitrators must have been corrupt or grossly partial, their award may be set aside. *Id.*

Where C, by his last will and testament, devised one third of all his estate to his wife, the whole of the estate of C, real and personal, by order of the court of chancery, was valued and appraised by three persons appointed by the court, and the widow made her election of parts of the real and personal estate, amounting to one-third of such appraised value. At the instance of the heirs, this appraisement was set aside, on the ground of a gross mistake of the appraisers in calculating the value of a certain part of the real estate, connected with other circumstances, though no actual fraud or misconduct was to be imputed to the appraisers. *Rogers et ux. v. Cruger et al.*, 7 Johns. Rep. 557.

Where two parties submit their difficulties to arbitrators, and agree to make the submission a rule of court, in a court of common law, pursuant to the act for determining difference by arbitrators, (1 Rev. Laws, 125,) the court of chancery will entertain jurisdiction to set aside the award unless injustice would be done. , *Tappan v. Heath*, 1 Paige, 293.

A mistake of judgment in arbitrators is not sufficient evidence of improper conduct on their part to justify the setting aside of their award in a court of chancery. *Campbell v. Western*, 3 Paige's Ch. Rep. 124.

An award not made a rule of court may be impeached in equity. *Turnpike Company v. Waters*, 6 Dana, 65.

Any annunciation by an arbitrator of his deliberate opinion and judgment upon the matter submitted to him, may be considered as an award; but if made without notice to the parties, or one of them, it will be illegal and not binding upon them, and either of them may have the award set aside in chancery. *Turnpike Company v. Waters*, 6 Dana, 69.

Courts of chancery exercise the power of modifying and setting aside awards for fraud or mistake, but this power will not be exercised unless the proof is clear. *Hardeman v. Burge*, 10 Yerger's Rep. 202.

And where the award is sought to be set aside for misbehavior, partiality or corruption of the arbitrators, the proof ought to be clear and conclusive. *Dougherty v. McWharten*, 7 Yerger's Rep. 239.

An award will not be set aside either in law or equity except for errors

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cient to warrant a recovery. *Tooley v. Undham*, Cro. Eliz. 206, cited Esp. Dig. 95. The defendant, when under arrest, could not legally make the note; it was extorted by

apparent on its face, or misconduct in the arbitrators, or some palpable mistake or fraud in one of the parties. *Head v. Muir*, 3 Randolph, 122.

But it will be set aside where the arbitrators heard evidence without giving the opposite party an opportunity of being heard or cross-examining the witnesses. *Shinnis v. Coil*, 1 McCord's Ch. Rep. 478.

So also, where arbitrators exceed their authority the award may be set aside *in toto*, or in some cases *pro tanto*. *McDaniel v. Bell*, 3 Haywood, 284. And so also, where it exceeds the submission, the excess will be set aside. *Gibson v. Broadfoot*, 3 Desau. 11.

And it ought not to be set aside unless in cases where the decision is plainly against law. *Clearly v. Moore*, 1 Haywood, 225. And in a case where the arbitrators meant to decide according to law. *Jones v. Frazer*, 1 Haw. Rep. 379. And they will not set aside an award for the misconduct of the arbitrators unless it is grossly and palpably wrong. *Ewing's adm'rs. v. Beauchamp*, 2 Bibb Rep. 456. But it will be set aside where the arbitrators were guilty of a fraud, or made a palpable mistake in the law or facts. *Callant v. Downey*, 2 J. J. Marsh. 348.

It will be set aside where it is not final, and is indefinite. *Hattier v. Etinaud*, 2 Desau. 580. So also, where it exceeds the submission the excess will be set aside. *Taylor's adm'rs. v. Nicholson*, 4 Hen. & Munf. 66. A court of equity will always relieve against the mistakes of arbitrators, if it can be done, by correcting the error, and not by setting aside the award. *Gregory v. Seamons*, 1 Root, 367.

A mistake of judgment in arbitrators is not sufficient evidence of improper conduct on their part to induce the court to set aside the award. *Campbell v. Western*, 3 Paige, 124. And the same principle was decided in *Cleaveland v. Dixon*, 4 J. J. Marsh. 228.

There must be corruption, partiality, or gross misbehavior in the arbitrators, or some palpable mistake of the law or fact. *Shephard v. Merrill*, 2 Johns. Ch. Rep. 276. *Pleasants v. Ross*, 1 Wash. 157.

Upon a submission of all matters in dispute between co-partners, the surviving or settling partner cannot complain of the award, because it directs him to pay an outstanding debt of the partnership. *Waugh v. Mitchell*, 1 Dev. & Batt. 518.

A portion of a religious society having seceded and formed a new church, a controversy arose as to their right to use the meeting house, which the old church denied. A committee of the old church was authorized to submit that question to arbitration, in which the new church concurred, and a submission was made. If the committee submitted more, as if they submitted any questions as to the rights of the old church, they exceeded their authority, and the submission and award was so far void. Yet, had the ar

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oppression, and taking an undue advantage. Had money even been paid upon it, an action might have been maintained to recover it back. *Aslly v. Reynolds*, 2 Stra. 915.

arbitrators under such an enlarged submission, decided merely that the new church had a right to use the house, as that was a matter within the authorized submission, the award would have been good. But they decided that neither party had any right to the meeting house, and yet that each should enjoy, alternately, an equal use: held, that the award is void for repugnance. *Curd et al. v. Wallace et al.*, 7 Dana, 194.

Whether an award fairly made by an arbitrator, can be annulled, because a fact which existed was not communicated by one of the parties to the arbitrator, or to the opposite party, when the person in whose favor the award is, had not undertaken to state the whole case, but the award was made upon a case agreed by counsel, *quære?* *Speight v. Speight*, 2 Dev. & Bess. 283.

Courts of chancery exercise the power of modifying and setting aside awards for fraud or mistake, but this power will not be exercised unless the proof is clear. *Hardman v. Burge*, 10 Yerger, 202.

Where an award is sought to be impeached upon the ground of misbehavior, partiality or corruption of the arbitrators, the proof ought to be clear and conclusive to set aside the award, especially if a great length of time is elapsed before the charge is made, and when some of the arbitrators are dead. *Dougherty v. McWhorty*, 7 Yerger, 239.

An award set aside, where the arbitrators heard evidence, without giving the opposite side an opportunity of being heard, or of cross-examination. *Shinnie v. Coil*, 1 McCord's Ch. Rep. 478.

Equity, after setting aside an award, will not entertain jurisdiction, where adequate remedy may be obtained at law. *Id.*

An award obtained by false and fraudulent statements of a party, may be set aside in chancery. That the party complaining of such award, assented to the admission of such statements, before the arbitrators, shall not preclude him from proving the same to be false and fraudulent, on a bill in chancery, for relief against the award. *Bulkeley v. Starr*, 2 Day, 553.

If arbitrators exceed their authority, the award may be set aside wholly or, in some cases, *pro tanto*, if the party complaining take the proper measures for that purpose. But this cannot be done after the award has been acquiesced in, and carried into effect. *McDaniel v. Bell*, 3 Haywood, 264.

A court of equity ought not to set aside an award for objections which might have availed in a court of law, and which the party failed to urge there, without a good excuse for the omission. *Head v. Muir*, 3 Randolph, 122.

An award cannot be set aside, either in law or equity, except for errors apparent on its face, misconduct in the arbitrators, or some palpable mistake or fraud in one of the parties. *Id.*

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Buller's opinion in *Cockshot v. Bennett*, 2 D. & E. 766. Against opening the cause on which the note was executed, the reference to arbitrators, and their award, cannot be urged. In *Steers v. Lashley*, 1 Esp. Rep. 166, which was

An award ought not to be set aside, unless in cases where the decision is plainly and grossly against law; not where the point decided might be doubtful. *Clary v. Coor*, 1 Haywood, 225.

An award ought not to be set aside, unless it certainly appears to be against law; and that, in a case where the arbitrators meant to decide according to law. *Jones v. Frasier*, 1 Hawkins, 379.

A court of equity will not set aside an award for misjudgment of the arbitrators, unless it is so grossly and palpably wrong as to amount to evidence of partiality or corruption. The refusal of the arbitrators to reduce the evidence to writing, is no evidence of partiality. *Ewing's Adm'r. v. Beauchamp*, 3 Bibb, 456.

An award can only be avoided by proving that the arbitrators were guilty of fraud, or made a palpable mistake in the law or the facts. *Cullant v. Doney*, 2 J. J. Marsh. 348.

An award set aside because it did not make a final settlement between the parties, and because it placed the complainant wholly in the power of the defendant, fixed no time for the payment of the debt, and left the mortgaged property in the hands of the mortgagor, to enjoy the profits indefinitely. *Hattier v. Etinaud*, 2 Desau. 670.

Where the award exceeds the submission, so much thereof will be set aside. *Gibson v. Broadfoot*, 3 Desau. 11.

An award made by arbitrators acting under an order of court, is conclusive on the party, as to the questions submitted to them, unless liable to objection for partiality, corruption, gross misconduct, or palpable mistake of the law. *Alwyn v. Perkins*, 3 Desau. 297.

An award ought not to be set aside, either in a court of law or equity, on the ground of a mistake in the judgment of the arbitrators, unless that mistake be very palpable. A mere difference of opinion between the court and the arbitrators, in a doubtful case, not being sufficient to authorize such interference. *Morris v. Ross*, 2 Hen. & Munf. 408.

An award may be corrected for error in law, where it appears on its face that the arbitrators intended to decide according to law, but have made a mistake. *Ryan v. Blount*, 1 Dev. Eq. 382.

The circumstance that a submission to arbitration contains a recital that one of the parties had warranted the title to a tract of land, when, in truth, the writing signed by him had not that effect, is not a sufficient reason to disturb the award, no fraud or undue influence appearing; and it being possible that the contract was mutually understood as a warranty, though its legal construction was otherwise. *Kincaid v. Cunningham*, 2 Munf. 1.

A court of chancery will go over the head of an award, to relieve against

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an action on a bill of exchange given for a balance awarded by arbitrators, the court permitted the defendant to impeach the note by showing the consideration illegal. On the au-

a fraud, which defeats all benefit from the award. *Hillyard v. Nichols*, 1 Root, 360.

Where relief is asked for, against the mistakes of arbitrators, in an award, a court of chancery will rectify them, if it can be done without setting aside the award. *Gregory v. Seamons*, 1 Root, 367.

That the arbitrators admitted improper evidence, is no ground for setting aside the award. *Lillard v. Casey*, 2 Bibb, 459.

A mere promise to set aside an award, without consideration, and without any loss to the other party in consequence of the promise, is no ground for resorting to a court of equity. *Id.*

Award not to be set aside for misjudgment or mistake, unless it be manifest upon the face of the award, and indicate the award not to be such as was intended. *Cleveland v. Dixon*, 4 J. J. Marsh, 228.

A mistake of judgment in arbitrators, is not sufficient evidence of improper conduct on their part, to justify the setting aside of their award in a court of chancery. *Campbell v. Western*, 3 Paige, 124.

Where accounts between trustee and *cestui que trust* are referred to arbitration, and the award is made a rule of a court of law under the statute 9 and 10 Wm. 3, though there be fraudulent misrepresentation by the trustee to the arbitrators, as to particular items of the account, a bill cannot be maintained by the *cestui que trust*, after the time limited by the statute has elapsed, to set aside the award as to the items impeached, leaving it to stand as to the remaining items, the award upon the face of it being entire. *Auriol v. Smith*, 1 Turner & Russell, 121.

There are two modes of excepting to awards; one for what appears on the face of the award itself, as that it does not come up to the requisites of the law for constituting a good award; the second, for matter extraneous, as misbehavior of the arbitrators. If the arbitrators do not pass upon all the matter referred to them, and this appears upon the face of the award, it is not a good one. So the award must be mutual, that is, must not leave him who is to pay liable to be sued for the same cause for which he is awarded to pay. *Blackledge v. Simpson*, 2 Haywood, 30.

An award will not be set aside in equity, on account of an omission by the arbitrators, to act upon part of the matters submitted, unless that omission shall have injured the complainant. *Davy's Ex'rs. v. Shaw*, 7 Cranch, 171.

When there is no charge of corruption or misconduct in the arbitrators, and the award, on the face of it, is final, nothing dehors the award can be pleaded, or given in evidence, to invalidate it. *Todd v. Barlow*, 2 Johns. Ch. Rep. 551.

An award will not be opened, or set aside, on the allegation of the discovery of a receipt which had been lost or mislaid, so that it could not be

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thority of this decision, the testimony offered ought to have been received, and the court, therefore, will grant a new trial to let it in.

produced before the arbitrators, to show a payment, unless under very special circumstances, and satisfactory proof of all due efforts to discover the receipt before the hearing, or to supply its loss, and of its discovery since the award. *Id.*

If there is no charge of corruption, partiality or undue practice in the arbitrators, an award will not be set aside, however unreasonable or unjust it may be. *Id.*

If arbitrators refuse to hear evidence, pertinent and material to the controversy, it is such a misconduct as will vitiate the award. *Van Cortlandt v. Underhill*, 17 Johns. Rep. 405.

An where persons, chosen by the parties to a lease to appraise the value of the mills and buildings, erected on the premises during the term, refused to hear evidence, offered by one of the parties, of the original cost of the buildings, this was held to be a sufficient cause for setting aside the award. *Id.*

So, partiality and corruption in either of the arbitrators, or the suppression and concealment of material facts, by either of the parties, if the knowledge of such facts would have produced a different result, are sufficient causes for setting aside the award. *Id.*

So, it seems, if the assessment of damages, or the appraisement of the arbitrators, be so erroneous and exorbitant as to induce a belief that the arbitrators must have been corrupt, or grossly partial, their award may be set aside. *Id.*

The power of courts of equity to revise awards does not extend to cases in which the objections to the award have been fully heard in a court of law. *Flournoy's ex'rs. v. Halcomb*, 2 Munf. 34.

In the case of an award, this court will not interfere, unless there has been fraud, imposition or mistake. *Shepard v. Merrill*, 2 Johns. Ch. Rep. 276.

Where the matter submitted was, what damages the one party or the other was to pay, on the surrender of a lease; and the arbitrators awarded a sum to be paid by the lessor to the lessee; but did not take into consideration the rent payable at the next quarter day, considering that matter as not in the controversy, or submitted; nor was it mentioned or brought before them by the parties; it was held that there was no mistake in the award. *Id.*

Courts of equity have jurisdiction to enforce a specific performance of an award respecting real estate. *M'Neil v. Magee*, 5 Mason, 244.

The court of chancery will not decree the performance of an award, unless on consideration of a subsequent agreement to perform it. *Somerville v. Freeman*, 4 Harr. & McHen. 43.

Whether an award can be proved by parol; and how far the court of chancery will enforce the performance of an award proved by parol. *Id.*

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Shephard, contra. There is no impeaching the award of the arbitrators, unless corruption be shown. The consideration of the note was to abide an award. It is not necessary that a bond should be given for this purpose. A pa-

Courts of equity have jurisdiction to enforce a specific performance of an award respecting real estate. But he who seeks performance must show a readiness to perform all the award on his part. *Id.*

After long delay, and laches, a court of equity will not decree a specific performance of an award; especially where there has been a material change of circumstances, and injury to the other party. A fortiori, it will not decree it against purchasers, even with notice, if their vendee is dead, and insolvent, so that they can have no remedy over. *Id.*

An award must be made within the time prescribed by the submission. *Smith v. Spencer*, 1 McCord's Ch. Rep. 93.

Where a testatrix, in her lifetime, submitted accounts to arbitration, and was satisfied with the award, and performed it, her representatives cannot open the settlement on account of usury in the accounts. *Estate of Radcliffe v. Wightman*, *Id.* 408.

Where some only of several distributees submit their interest to arbitration, the award will be binding on the parties to the submission, as far as their interests are concerned. *Smith v. Smith*, 4 Randolph, 95.

When parties submit a question of law alone to arbitrators, the award is binding, even though contrary to law. *Id.*

Change of opinion of one or all of the arbitrators after award returned, cannot affect their award. *Cleveland v. Dixon*, 4 J. J. Marsh. 228.

If submission comprehend the subject matter acted on, it is no objection to the award, that it comprehends other matters. *Id.*

If there be a mistake, apparent on the face of an award, made under a rule of a court of common law, and acted on by that court, it is a good ground of relief in a court of chancery. *Howard v. Warfield*, 4 Harr. & McHen. 21.

Where an award is made under a rule of a court of common law, to which it is returned, and to which judgment is thereon entered, and of which the power is co-extensive with the power of the court of chancery, is the party precluded from relief in equity? *Id.*

If parties submit two interfering claims to arbitration, and it turns out, after award made, that one of the parties had no power over the principal part of the interfering claim submitted on his part, a court of equity will not enforce the award in his favor. *Payne v. Moore*, 2 Bibb. 163.

So, also, if he, after the award, part with a part of the interference which was awarded in favor of the other party. *Id.*

In cases of bonds to perform awards, there are two remedies: 1. At law upon the bond, in which a plea that the arbitrators made no award, would,

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rol submission is equally good; and if it may be by parol, it may be by note, and the submission is the consideration for which it was given. Had there been only a verbal agreement, and the referees had ordered 100 dollars to be paid, *could it have been said that no [*168] recovery could have been had? If not, then nothing can be urged against the present verdict. No unfair practices were shown, and none are to be presumed.

Russel, in reply. Had notes been executed by both parties, it would have altered the case; but here only one is given, and he is to pay at all events. If evidence of the nature of the matter submitted is to be shut out, an usurious transaction may be made the basis of a legal demand.

if true, defeat the plaintiff's action: 2. If any act be awarded to be done, for which a complete remedy cannot be had at law, (such as to make a conveyance,) a bill in equity, for a specific performance of the award, is common and proper. But the court cannot decree specific performance, where no award has been or can be made. *Smallwood v. Mercer*, 1 Wash. 290.

Where arbitrators, after a witness had been sworn and examined, and they were left alone to deliberate on their award, called the witness again, and without the knowledge or presence of the parties, examined him as "to matters material to the controversy, on which he had before given testimony, but about which the arbitrators differed as to what the witness did testify on the former hearing," an injunction to stay a suit at law, on the arbitration bond, for the performance of the award, was refused. *Herrick v. Blair*, 1 Johns. Ch. Rep. 101.

This court will not grant an injunction to stay an action at law, on an award, on the ground that the plaintiff was surprised by the principal witness for the defendants swearing falsely before the arbitrators, and that he could have proved the falsehood of the testimony, if the arbitrators would have adjourned the hearing for that purpose, which they refused to do, though requested by the plaintiff, who offered to enlarge the time of making the award. *Woodworth v. Van Buskirk*, 1 Johns. Ch. Rep. 432.

This court will correct a mistake of an extra judicial nature, in an award of arbitrators, and decree a performance of it in specie. *Bruck v. Wilder*, 2 Johns. Ch. Rep. 405.

After a cause has been argued, and finally submitted to the arbitrator for his decision, neither party has a right to revoke the powers of the arbitrator. *Id.* *Vide Moore v. Sherman*, 5 Paige, 575; *vide Amer. Ch. Dig.*, vol. 1, p. 219, *et seq.*

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THOMPSON, J., delivered the opinion of the court. The present application for a new trial is made on three grounds: 1. The want of consideration for the note on which the action is brought; 2. That it was obtained by oppression and undue advantage; 3. That the judge at the circuit excluded testimony which ought to have been admitted.

The want of consideration cannot be objected against the note. There was an agreement between the parties to submit to arbitration a matter in controversy between them. Kyd on Awards, 7. *Freeman v. Bernard*, 1 Ld. Raym. 248. Though this agreement was by parol, there can be no doubt but it was a good submission, and binding on the parties. We are to intend that a counter note was given,^(a) as no objection on that ground was made at the trial, and the agreement to submit was fully shown. The note in question may be considered as the award of the arbitrators. It was conditional when made and put into their hands, to become consummated by their decision of the matter submitted; and by such decision, it has become absolute for the payment of the money awarded to the plaintiff. The consideration, if any, was necessary, for the submission was the discharge of the defendant from the arrest.

The second objection is equally untenable. Nothing is shown in the case that looks like oppression, or undue advantage. It is true, the defendant was under an arrest; but that of itself could not have been enough to avoid his acts, even had there been a final settlement, which, however, was not the case. There was only an agreement to submit the matter upon which he was arrested, to arbitration; the merits of which controversy he had the right of contesting before the arbitrators.

[*169] *With respect to the third point, we think the testimony properly overruled. The evidence of:

(a) Why might not the note declared on have been delivered as an escrow?

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ferred was respecting the original cause of action, which had been submitted to, and determined by the arbitrators, with a view to open the whole merits of the controversy. This was certainly inadmissible. There is no rule better settled, or more consonant to good sense, than that which precludes parties from litigating on the original subjects of dispute, which have been fairly and *legally* submitted to judges of their own choosing, and an award made pursuant to such submission. Kyd, 242. *Bailey v. Lechmere*, 1 Esp. Rep. 378. There are, however, exceptions to this rule, as where there have been some corrupt practices, or improper conduct on the part of the arbitrators. Nothing of that being presented in this case, we think the award final and conclusive. The opinion of the court, therefore, is, that the defendant take nothing by his motion, and that the plaintiff have judgment.

Postea to the plaintiff.

TREADWELL *against* STEELE.

Under a covenant not to cut wood but from lands "then cleared, or which should thereafter be cleared," if the breach be assigned in cutting on lands which the defendant had not cleared, it is bad, as they might have been cleared by others.

IN COVENANT, by which the defendant agreed that "he would neither cut, or carry off the premises, or suffer to be cut and carried off by others, any timber but from the lands which then were, or should thereafter be cleared," the plaintiff laid his breach, that the defendant "did cut and carry off the premises, other than such parts of the same as the defendant had, or has yet cleared, divers large quantities of timber, &c., and did also suffer divers other persons to cut and carry away off the premises, other than such parts as the defendant had, or yet has cleared, divers other," &c.

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Shepherd, in arrest of judgment, said the covenant did not restrict from cutting wood on parts then cleared, though by others.

Per Curiam. The breach is clearly bad; the fact assigned may be true, and yet the defendant might, under the covenant, have lawfully taken the timber, as it might have been from land cleared by others.

Judgment arrested.

[*170] *BENTLEY and others against SMITH and others.

A promissory note to A. B., C. D., E. F. & Co, though there be no other persons in the firm, cannot be declared on by them with the addition of & Company, but their individual names must be stated, with the usual description of trading under the style, &c.; if otherwise, it is bad on general demurrer.

On a promissory note to Thomas Bentley, Allen Potter, John P. Becker & Co., the declaration commenced in this way :

Albany, to wit: Thomas Bentley, Allen Potter, John P. Becker & Co., complain, &c. To this a general demurrer.

Foote insisted that it was evident, on the face of the record, there were other persons not mentioned who ought to have been joined. Such a circumstance, if proved on a trial, would have prevented a recovery, and was equally fatal on general demurrer.

Crary, contra, was stopped by the court.

Per Curiam. Stating that the plaintiffs named and company complain, is acknowledging that other persons ought to sue. Did the defendants even acknowledge there

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were no others, this mode of declaring ought not to be suffered. Why did you not say Thomas Bentley, Allen Potter, and John P. Becker, trading under the style and firm of T. B., A. P., J. P. B. & Co.? The demurrer is well taken,^(a) and the defendants entitled to judgment. But the plaintiffs amend on payment of costs.

 MOOR *against* AMES.

An action will not lie before one justice, to recover back the amount of a fine imposed on a witness by another justice, for a contempt in a suit before him.

ON *certiorari*. The suit before the justice was to recover back a fine of 5 dollars imposed by the now plaintiff upon the present defendant, for a contempt in refusing to be sworn, or answer as a witness in a cause tried before him.

Per Curiam. A justice is not liable to a suit for a judicial act, and the merits of the imposition of the fine cannot be overhauled before another justice. The magistrate in the first suit had exclusive jurisdiction to determine when the witness was in contempt.

Judgment reversed.

(a) If a plaintiff have the same christian name as the defendant, and, after stating the names of each party correctly, and at full length, use the christian name only, as "the said James being in custody," it is certain to a common intent, and good on special demurrer. *Hildreth v. Harvey*, July, 1801, MS., Kent, Ch. J. But had the christian names been different, and that of the plaintiff used for the defendant, it would have been fatal even on general demurrer. *Harvey v. Stokes*, Willes, 5.

Leonard v. Freeman.

BRADT against GRAY.

This court will not proceed where there is not a *lis pendens* here.

A BILL of exceptions had been sealed by the judges of the common pleas, and the parties attempted to bring on the argument, though no writ of error had been sued out.

Per Curiam. Take back your cases. There is no *lis pendens*.

[*171] *LEONARD against FREEMAN.

The court of chancery has exclusive jurisdiction over the question of costs accrued in that court.

It appeared, on the return to the *certiorari*, that the action in the court below, and in which a recovery had taken place, was instituted for expenses incurred in going to Albany, to swear to an answer to a bill filed by the now plaintiff against the present defendant.

Per Curiam. The court of chancery has the exclusive right to determine questions of costs in suits before it; and though the ground of the action might have been a vexatious bill, the justice could not have any cognizance.

Judgment reversed.

Colden v. Dopkin.

COLDEN *against* DOPKIN.

If, on the return day of the summons, the defendant plead, and the justice, without his consent, adjourn, on the prayer of the plaintiff, for more than six days, it is fatal.

KENT, Ch. J. This is a case upon *certiorari*, brought to reverse a justice's judgment, and submitted without argument. Several errors are alleged in the proceedings below, but it will be sufficient to notice only that the justice adjourned the cause for more than six days, without consent. The return states, that the defendant below was sued by summons, which was returnable on the 26th of July; that the parties appeared on that day and pleaded; that the plaintiff below prayed a day to prove his account, and the justice thereon adjourned the court to the 2d August, on which day the plaintiff appeared in court, and the defendant was present, but said nothing, whereupon the justice, after hearing the proofs and allegations of the plaintiff, gave judgment for him.

Upon this case the justice had no authority to adjourn for more than six days after the day of appearance of the parties on the summons. The second section of the 10L act is positive, that the justice shall, upon the return of the summons, or at some other time, not exceeding six days thereafter, proceed to hear the cause, and, in the present instance, the 2nd of August was the 7th day thereafter. There are other provisions in the act respecting adjournments; but none of them have any application to the present case, and there is nothing in the return from which we can presume any consent or acquiescence on the part of the defendant. The return contains pretty strong evidence to the contrary. *On the day of [*172] the return of the summons, the defendant pleaded a special plea, and the plaintiff refused to reply, but called upon the defendant to plead the general issue, which he refused to do, and then the adjournment took place at the prayer of the plaintiff; and on the day of adjournment

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the defendant took no part in the proceedings, but remained a silent spectator. On this ground, therefore, of an adjournment beyond the time authorized by the act, the judgment below must be reserved; for, where the act is positive in its directions, it must be strictly observed. The same point arose, and was determined, in the case of *Palmer v. Green*, in April term, 1799, and that decision, being in point, governs the present.[1]

[1] As to adjournments in justices courts, see Waterman's N. Y. Treatise, p. 109, *et seq.*

In the state of New York, the sixty-seventh and sixty-eighth sections of the statute authorize the justice, on the return of a summons or attachment, or on the joining of issue without process, but at no other time, to adjourn the cause, on his own motion, whether the parties consent or not, not exceeding eight days. Vid. 2 John. 192; 7 id. 529. The exercise of this right is left to the discretion of the justice, and is not authorized in a cause commenced by warrant, or at any other time than on the return of process. The discretion thus given to a justice, is not an arbitrary one, but ought to be soundly and judiciously exercised. And, although on the one hand, he ought not to adjourn the cause on his own motion, when satisfied it will injuriously affect the rights of either party, so, on the other hand, he should not refuse an adjournment where the situation of either party really demands it, although he is unable to make out a case for an adjournment under the other sections of the statute. Thus, in a case under the old act, substantially like the present in this particular, where the defendant appeared before the justice on the morning of the return day of the summons, and applied in writing for an adjournment, on account of his child being dangerously ill, which was then denied, and on the same day, before the parties were called, the defendant's father appeared in his behalf to get an adjournment, and testified that the defendant's child was dangerously sick, and the justice refused to adjourn, but gave judgment for the plaintiff; the supreme court held, (the cause having come before them on writ of error,) that the situation of the defendant's child was such as ought to have induced the justice to put off the trial; and for that reason they reversed the judgment of the common pleas, which was in affirmance of the justice's judgment. 8 John. 426. In computing the time for which a justice is authorized to adjourn the cause, under the sections above referred to, within the rule, ante, 262, 263, the day of adjourning is to be excluded, so that if the process be returnable on Wednesday, the justice would have no power to adjourn beyond the Thursday of the next week. Vid. 1 Cowen, 234. The justice cannot proceed with the trial, at a place different from that mentioned in the summons, unless the defendant appear; (1 John. Cas. 243;) but he may adjourn to another place, without the consent of parties, both parties having

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first appeared at the place mentioned in the process. 1 Cowen, 112. If the defendant do not appear, the justice has no right to wait two hours after the time of appearance, and then to appear himself at the place appointed and adjourn the cause. 11 John. 407.

Under the sixty-ninth section, if the defendant do not appear at the trial on the return of the summons or attachment, the justice may adjourn the cause to a time certain, not exceeding eight days, on the simple motion of the plaintiff, without oath; and so, if the defendant do appear and does not object to the adjournment; but the defendant may object to the adjournment, and require, as a condition of its being granted, that the plaintiff or his attorney make oath that he cannot, for want of some material testimony or witness, safely proceed to trial. An adjournment on the application of the plaintiff, cannot be granted at any other time than on the return of a summons or attachment, or the joining of issue without process; (Vid. 9 John. 136; 7 id. 530; 2 id. 192;) nor can the defendant compel the plaintiff or his attorney to disclose the nature or name of the absent testimony or witness. The form of the oath to be administered to either party on applying for an adjournment, where an oath is required, may be in the form given at the close of this head.

The adjournment, whether on the justice's own motion, or on motion of the plaintiff, must be for the next eight days immediately after the return of the process. 7 id. 381. The adjournment may be, however, for any period within that time; but cannot exceed it, except by consent of parties. When the justice adjourns on his own motion, he may of course do so, without requiring proof of the absence of a material witness. 9 id. 354.

In adjourning a cause, the justice must, in all cases, be present in proper person, and can never do this by sending a note in writing to the parties, informing them of the time and place to which he has adjourned. 4 id. 117.

If the suit is commenced, in favor of a non-resident plaintiff, by short summons, as authorized by the non-imprisonment act, and the same shall be returned personally served, the same proceedings shall be had and no longer adjournment granted than in case of a warrant at the instance of a non-resident plaintiff. Laws of 1831, p. 403, s. 32; Vid. also 2 R. S. 201, 202, s. 291. Cowen's Tr., 2 ed., vol. 2, p. 328, *et seq.*

 Broome v. Beardsley.

BROOME *against* BEARDSLEY.

Continuances are from term to term; therefore, a matter arising between a term and a circuit, may(a) be pleaded at the circuit as a plea *puis darrein continuance*, at any time before verdict rendered, and the judge at *nisi prius* is bound to receive it, such plea being a matter of right.

COVENANT on a sealed note, with a plea of *non in/regit conventionem*.

At the trial, after the jury were called, and placed in the jury-box, the defendant tendered a plea duly verified by affidavit, that he had, *puis darrein continuance*, under the act for giving relief in cases of insolvency, obtained his discharge, an exemplified copy of which he produced. This being rejected as coming too late, he then offered in evidence the discharge itself, as a bar to the plaintiff's right of recovery. Against the reception of the testimony it was insisted that it was not admissible under the issue joined, nor without having been specifically pleaded, or notice given. The points being reserved, a verdict was taken, subject to the opinion of the court, whether it should stand, or a new trial be granted.

Woodworth, for the plaintiff. The plea *puis darrein continuance* must be pleaded between the last and the next continuance, into which it cannot be carried. Here the circuit was the next continuance, and the plea should therefore have been delivered before the first day. 3 Black. Com. 317. In no case can it be received after the jury are sworn. *Paris v. Salkeld*, 2 Wils. 138. The discharge could not be given in evidence, because the statute (1 Rev. Laws, 434,) allows of it only under the general issue, which is, when the plea denies or traverses the [*178] whole declaration. Imp. K. B. 324. *That be-

(a) They must be pleaded if pleadable at all; for they cannot be given in evidence on the trial. *Jackson v. Rich*, 7 Johns. Rep. 194.

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fore the court does not do so, for it admits the execution of the instrument.

Root, contra. The plea may be tendered at any time before verdict. *Pearson v. Parkins*, Bull. N. P. 810. 7 Bac. Abr. by Gwillim, 858. The reasons why it must not be on the day in bank(a) are to be seen fully stated in 4 Bac. Abr. 143, 144. From hence we may lay it down that any time before verdict is not too late. In the very case cited from Wilson, it was ruled that the court were bound to receive the plea; for, at *nisi prius*, it cannot be determined whether it be good or bad; the party must be driven to his demurrer. On the second point it will be unnecessary to answer. A general issue is that which concludes to the country, and denies the declaration of the plaintiff.

Woodworth, in reply. Saying that a plea of *puis darrein continuance* may be received before verdict, amounts only to its not being admissible after; not that it may be tendered at any time before. If the event take place, so that it could not be availed of earlier, the doctrine applies; as if after the commencement of the circuit, and before verdict.

Per Curiam. The case of *Paris v. Salkeld* is decisive that a plea *puis darrein continuance* is matter of right: and, if verified by affidavit,(b) the judge at *nisi prius* has no discretion to accept it or not, but is bound to admit it.

There is not a *dictum* to be met with that the plea was too late. In the case of *Pearson v. Parkins*, cited in *Buller's Nisi Prius*, 810, it was holden that it might be pleaded

(a) It may be on the very day in bank, if the jury were not taken at *nisi prius*. Dort. Pl. 300.

(b) It is the constant practice at *nisi prius* to compel the party to verify his plea before it is received. *Marten v. Wyvill*, 1 Str. 493; but it is not necessary, if the court be satisfied of its truth. *Banker v. Ash*, 9 Johns. Rep. 250.

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after the jury are gone from the bar, but not after they have given their verdict. The facts, to warrant this plea, must have happened since the last, and before the next continuance. The last continuance is the return day of the *venire facias*, where the proceedings are in the ancient method; the next continuance is the first day in bank thereafter, or the first day of the succeeding term. Continuances are from term to term. The plea was well pleaded, and ought to have been received. The verdict must, therefore, be set aside without costs, and the plea tendered be filed *nunc pro tunc*, and be deemed parcel of the *mas prius* record.(a)

New trial.[1]

(a) See *Larkey v. Briggs and M'Donald*, 3 Caines' Rep. 117, n. (a). *Shore v. Wilmerden*, 2 Caines' Rep. 380.

[1] This plea, when pleaded at the circuit, cannot be answered there, either by replication or demurrer; but must be returned into the S. C. for that purpose. *Beckman v. Peck*, 5 Hill, 513.

If, however, it is put in by one of several defendants, and contains matter in bar, going to his own personal discharge, without effecting the action against the rest, the plaintiff may confess the plea at once, enter a *nolle prosequi* in respect to such defendant, and proceed to trial against the others; but before going to trial, the plaintiff should put the confession and *nolle prosequi* in writing, and serve a copy. *Id.*

And, whether there are several defendants, or only one, if a defendant pleads some matter, which goes only to the remedy, as a discharge from imprisonment, the plaintiff may confess the truth of the plea at the circuit, and proceed with the trial. *Id.*

A judge at the circuit may receive a plea *puis darrein continuance*, without proof of its truth; but, it seems, he should reject it, unless verified in some way. *West v. Stanley*, 1 Hill, 69.

In demurrer to a plea *puis darrein continuance*, it cannot be objected that it is not verified by affidavit, nor that it is accompanied by another plea; such questions can be raised only on motion. *Nicholl v. Mason*, 21 Wen. 334.

A plea of title to a portion of the premises claimed in an action of ejectment, put in *puis darrein continuance* after a plea of the general issue, is not a waiver of the general issue, so as to authorize the plaintiff, on the neglect of the defendant, to rejoin to a replication put in by the plaintiff to take judgment on the whole declaration; it is a waiver of only so much of the general issue as is covered by the second plea. The plea may be bad as not answering the whole declaration; but the plaintiff should have demurred. *Morris v. Cook*, 19 Wen. 699.

Matter of defence arising after issue joined should regularly be pleaded at

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or before the time of the next continuance; a plea subsequently put in, will, however, be sustained upon satisfactory excuse; but, if it appear that the defence rests in fraud, the plea will be stricken out. *Tuffs v. Gibbons*, 19 Wen. 639.

A plea *puis darrein continuance*, in bar of the action, is a waiver of all former pleas. Even upon a plea in abatement pleaded *puis darrein*, the judgment, whether upon demurrer or verdict, is final *quod recuperat*, and not a *respondet ouster*. *Culver v. Barney*, 14 Wen. 161; *Kimball v. Huntington*, 10 Wen. 675.

The rule, however, does not apply where the matter of the plea affects the remedy only, and not the right of action; thus a plea *puis darrein* of discharge under the act abolishing Imprisonment, &c., is not a waiver of a plea in bar previously pleaded, but the plaintiff must proceed and try the issue before joined. *Id.*

A plea *puis darrein continuance* of a discharge under the act abolishing imprisonment for debt in certain cases, is not a waiver of a plea in bar before put in; and the plaintiff cannot confess the plea and take judgment, but must proceed and try the former issues. *Rayner v. Dyett*, 2 Wen. 300.

An insolvent's discharge, obtained during term, (17th May,) may be pleaded *puis darrein continuance*, at the circuit, (5th June,) the delay not being unreasonable; and, in the discretion of the judge, the plea may be received without its being verified. *La Farge v. Carrier*, 1 Wen. 89.

An objection that a plea *puis darrein continuance* was not put in in time must be made by motion to set the plea aside, and cannot be taken on demurrer. *Ludlow v. M'Crex*, 1 Wen. 228.

A plea *puis darrein continuance* may, in general, be pleaded without being verified by affidavit. *Jackson v. Peer*, 4 Cow. 418.

And the defendant may enter a rule of course to amend such a plea as in other cases. *Id.*

Matter of defence arising after issue joined must be pleaded *puis darrein continuance*. *Jackson v. Ramsey*, 3 Cow. 75.

This rule applies as well to ejectment as to other actions; as where the defendant acquires title by deed after issue. *Id.*

But where R. purchased the premises at sheriff's sale, on a judgment and execution against M., and took no deed; and then M.'s devisee brought ejectment, after issue joined, in which R. obtained a sheriff's deed; held, that this need not be pleaded, but might be given in evidence under the general issue. *Id.*

The last continuance is the last day of the return of the *venire factas*. *Palmer v. Hutchins*, 1 Cow. 42.

And a plea *puis*, &c., cannot be interposed after a verdict, or a relicts and *cognovit*. *Id.*

After an administratrix has pleaded the general issue and a plea of *plene administravit præter* a certain sum, and the plaintiff in the action has replied, admitting the truth of the second plea, praying judgment, &c., a plea *puis darrein continuance*, setting forth a judgment confessed by the administratrix in a

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suit commenced since the action in which the plea is interposed was at issue and noticed for trial, will be received and considered good. *Laurence v. Bush*, 3 Wen. 305.

Matter of defence arising after issue joined, intermediate the term and the circuit, must be plead at the circuit. A plea *puis darrein* under such circumstances, cannot be served in vacation. *Field v. Goodman*, 3 Wen. 310.

Where a plea *puis darrein continuance* is filed in term time, a copy of it must be served; but where the matter of the plea arises in vacation, so that it can only be offered at the circuit to prevent a trial, no copy is necessary. *Jackson ex dem. Barhydt v. Clow*, 13 J. R. 157.

A plea in bar as of a discharge under the insolvent act, pleaded *puis darrein continuance*, need not be verified by affidavit, unless tendered at the court on sitting; nor then, if probable cause of its truth be shown to the judge, who may receive it without oath or not, in his discretion. *Bancker v. Ash*, 9 J. R. 250.

When such plea is pleaded in bank without affidavit, it cannot be treated as a nullity, but must take an issue to it, or move to have it set aside. *Id.*

Where two actions are brought for the same cause, satisfaction of the judgment on one suit, (if not the recovery alone,) may be pleaded *puis darrein continuance* to the other suit. *Browne v. Joy*, 9 J. R. 221.

Matter arising after issue joined, and which may be pleaded by way of plea, *puis darrein continuance*, must be so pleaded without delay. *Jackson ex dem. Colden v. Rich*, 7 J. R. 194.

It cannot be given in evidence without being pleaded. *Id.*

The judge at *nisi prius* is bound to receive a plea *puis darrein continuance*, when properly pleaded. *Broome v. Beardsley*, 3 Cal. 172.

It may be pleaded after the jury are called. *Id.*

Where a declaration on a promissory note alleged that the defendant did not pay the sum in the note mentioned, &c., and the defendant pleaded *puis darrein continuance* that he paid to the plaintiff the several sums of money mentioned in the plaintiff's declaration; on demurrer the plea was held good, being as broad as the declaration, and the meaning of it being that the defendant had paid the amount of the notes, and if they were notes carrying interest, that he had paid the interest also, and that there was no necessity of stating that the plaintiff accepted the money in satisfaction. *Chew v. Woolley*, 7 J. R. 399.

If the defendant has an imparlance, during which he pays the plaintiff's demand, after the imparlance he may plead a regular plea of payment, and is not put to plead it *puis darrein continuance*. *Tillotson v. Preston*, 3 J. R. 229.

In an action for a libel, the defendant pleaded *puis darrein continuance*, that he was a partner with C. in the printing and publishing of the newspaper which contained the libel, and that the plaintiff brought a separate action against C. for the same identical publication, and recovered judgment which had been satisfied, held to be a good plea. *Thomas v. Rumsey*, 6 J. R. 26. 4 N. Y. Dig., p. 918, *et seq.*

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*TOWER *against* WILSON.

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If a party serving a notice has not kept a copy, he may prove its contents by parol evidence.

THE only point was, whether a party who has served a notice, without keeping a copy of it, might give parol evidence of its contents.

Per Curiam. There was a notice served on the defendant to produce a *fi. fa.* on the trial, or that the plaintiff would prove it by parol. It appears that no copy of this notice was kept. We think it might be proved by an affidavit of its contents. In this instance there is no other way to establish it, and the defendant has it in his power, by producing the original, to correct mistakes. In Tidd's Forms notices are proved by affidavits of the substance of their contents.(a)[1]

(a) See *Peyton v. Hallett*, 1 Caines' Rep. 373, and the authorities there.

[1] A suit was brought for the penalty incurred by commissioners of highways, in refusing to prosecute an overseer, who had neglected to remove obstructions. On the trial in the common pleas, the plaintiff deemed it material to show, that the defendants had given notice in writing to the overseer, requiring him to perform his duty by removing the obstructions; and the court held, that parol evidence of the notice was inadmissible, unless its absence was accounted for. On the cause coming before the supreme court, upon error brought, the latter decided that no notice to the overseer was necessary to be shown, and consequently the ruling of the common pleas as to the mode of proving it, was entirely unimportant. But Savage, C. J., who delivered the opinion, said, that if the statute had required notice to the overseer, as a condition to his liability, then the decision of the common pleas would have been correct. The doctrine he advanced, was this: That written notice, which form part of the foundation of the cause, cannot be proved by parol without accounting for their absence; but otherwise, as to notices which relate only to some collateral fact. For instance, in an action against an overseer, for neglecting to procure scrapers, &c., (in which case the statute does not require him to act, except after notice from the commissioners,) secondary evidence of the contents of the notice would be inadmissible, unless notice to produce the original had been given. *M'Fadden v. Kingsbury*, 11 Wend. Rep. 667, 668, 669. A similar doctrine was recog

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nized by Toomer, J., in *Faribault v. Ely*, 2 Dev. Rep. 67, 68. In that case, after noticing the remarks of Mr. Starkie, the substance of which are stated *supra*, he says: A notice given during the progress of the cause, to produce a paper for the purpose of evidence, is formal in its character, and comes within the reason of the exception. But, a notice which has been given before the commencement of the suit, which makes an essential part of the cause of action, which is a link in the chain of the plaintiff's right to recover, is of a different character, and would seem to require the best evidence the nature of the case would admit, and all the cautions which the rules of evidence prescribe. *Id.* 68. Cowen & Hill's Notes, part 2, p. 434.

 STILLSON against SANFORD.

Though the sums in the several counts before a justice exceed 25 dollars, yet, if no one count be for more, and the damages be laid at only 25 dollars, it is within the jurisdiction of the 10^l. court. If it appear on the whole of the record, that the cause before a justice has been fairly tried, the judgment will not be reversed for want of joining in issue or any technical error in the pleadings.

SHEPHARD assigned as errors on *certiorari*, first, that it appeared on the face of the record that the demand before the justice was beyond his jurisdiction; secondly, that the cause was tried, though no issue appeared to have been joined.

On the first point, he said, the several sums in the various counts amounted to more than 15 dollars, and were for different matters; this, though the declaration did conclude within the sum authorized by the 10^l. act, was he argued, erroneous.(a)

Per Curiam. It has been decided otherwise in a case in Colman.

Shephard. The plea, though beginning as a demurrer, was, in substance, a former recovery in bar, which the re-

(a) See *Houghton v. Strong*, 1 Caines' Rep. 486.

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plication denies ; but though there is no issue on the fact, the justice goes on to try.

Per Curiam. Whenever we can possibly intend from the record that the merits were fairly tried, we will not examine or test by technical rules the formality of the pleadings.

Judgment affirmed.

TOWER *against* WILSON, SHERIFF OF WASHINGTON.

In an action against a sheriff for levying on wrong property, to warrant a certificate that the trespass was wilful and malicious, it must appear either that the execution was served by him, or with his knowledge, for a constructive trespass does not make it voluntary.

THIS was an action of trespass, brought by the plaintiff for an illegal levy on his property whilst in his own hands, by a deputy of the defendant under a *fi. fa.*, against another person.

*The judge, considering that when the property [*175] of a third person was taken wrongfully in execution, the malice was an inference of law, arising on the facts, and that the defendant was responsible, for the conduct of his deputy, had certified the trespass to be wilful and malicious.

Shephard now moved to have the certificate vacated.

Per Curiam. The trespass here was not voluntary in the defendant, for he is sued for an act of his deputy in taking wrong property on a *fi. fa.* when he knew nothing of it himself. To make the case of *Stiles and Hathway* apply, the trespass must be voluntary in fact, and not merely by construction. In the present instance it is impossible to say the act was voluntary in the defendant.

Motion granted.

 Pierson v. Post.

 PIERSON *against* POST.

Pursuit alone gives no right of property in animals *feræ naturæ*, therefore an action will not lie against a man for killing and taking one pursued by, and in the view of, the person who originally found, started, chased it, and was on the point of seizing it. Occupancy in wild animals can be acquired only by possession, but such possession does not signify manucaption, though it must be of such a kind as by nets, snares or other means, as to so circumvent the creature that he cannot escape.

THIS was an action of trespass on the case commenced in a justice's court, by the present defendant against the now plaintiff.

The declaration stated that Post, being in possession of certain dogs and hounds under his command, did, "upon a certain wild and uninhabited, unpossessed and waste land, called the beach, find and start one of those noxious beasts called a fox," and whilst there hunting, chasing and pursuing the same with his dogs and hounds, and when in view thereof, Pierson, well knowing the fox was so hunted and pursued, did, in the sight of Post, to prevent his catching the same, kill and carry it off. A verdict having been rendered for the plaintiff below, the defendant there sued out a *certiorari*, and now assigned for error, that the declaration and the matters therein contained were not sufficient in law to maintain an action.

Sanford, for the now plaintiff. It is firmly settled that animals, *feræ naturæ*, belong not to any one. If, then, Post had not acquired any property in the fox, when it was killed by Pierson, he had no right in it which could be the subject of injury. As, however, a property may be gained in such an animal, it will be necessary to advert to the facts set forth, to see whether they are such as could give a legal interest in the creature, that was the cause of the suit below. Finding, hunting, and pursuit, are all [*176] that the plaint enumerates. To *create a title to

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an animal *feræ naturæ*, occupancy is indispensable. It is the only mode recognised by our system. 2 Black. Com. 403. The reason of the thing shows it to be so. For whatever is not appropriated by positive institutions, can be exclusively possessed by natural law alone. Occupancy is the sole method this code acknowledges. Authorities are not wanting to this effect. Just. lib. 2, tit. 1, s. 12. "*Feræ igitur bestiæ, simul atque ab aliquo captæ fuerint jure gentium statim illius esse incipiunt.*" There must be a taking; and even that is not in all cases sufficient, for in the same section he observes, "*Quicquid autem eorum ceperis, eo usque tuum esse intelligitur, donec tua custodia coerceatur; cum vero tuam evaserit custodiam, et in libertatem naturalem sese receperit, tuam esse desinit, et rursus occupantis fit.*" It is added also that this natural liberty may be regained even if in sight of the pursuer, "*ita sit, ut difficilis sit ejus persecutio.*" In section 13, it is laid down, that even wounding will not give a right of property in an animal that is unreclaimed. For, notwithstanding the wound, "*multa accidere soleant ut eam non capias,*" and "*non aliter tuam esse quam si eam ceperis.*" Fleta, b. 3, p. 175, and Bracton, b. 2, c. 1, p. 86, are in unison with the Roman lawgiver. It is manifest, then, from the record, that there was no title in Post, and the action, therefore, not maintainable.

Colden, contra. I admit with Fleta, that pursuit alone does not give a right of property in animals *feræ naturæ*, and I admit also that occupancy is to give a title to them. But then, what kind of occupancy? and here I shall contend it is not such as is derived from manucaption alone. In Puffendorf's Law of Nature and of Nations, (b. 4, c. 4, s. 5, n. 6, by Barbeyrac,) notice is taken of this principle of taking possession. It is there combatted, nay, disproved; and in b. 4, c. 6, s. 2, n. 2. Ibid. s. 7, n. 2, demonstrated that manucaption is only one of many means to declare the intention of exclusively appropriating that, which was before in a state of nature. Any continued act which does this, is equivalent to occupancy. Pursuit, therefore, by a

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person who starts a wild animal, gives an exclusive right whilst it is followed. It is all the possession the [*177] nature of the subject *admits; it declares the intention of acquiring dominion, and is as much to be respected as manucaption itself. The contrary idea, requiring actual taking, proceeds, as Mr. Barbeyrac observes, in Puffendorf, b. 4, c. 6, s. 10, on a "false notion of possession."

Sanford, in reply. The only authority relied on is that of an annotator. On the question now before the court, we have taken our principles from the civil code, and nothing has been urged to impeach those quoted from the authors referred to.

TOMPKINS, J. delivered the opinion of the court. This cause comes before us on a return to a *certiorari* directed to one of the justices of Queens county.

The question submitted by the counsel in this cause for our determination is, whether Lodowick Post, by the pursuit with his hounds in the manner alleged in his declaration, acquired such a right to, or property in, the fox as will sustain an action against Pierson for killing and taking him away?

The cause was argued with much ability by the counsel on both sides, and presents for our decision a novel and nice question. It is admitted that a fox is an animal *feræ naturæ*, and that property in such animals is acquired by occupancy only. These admissions narrow the discussion to the simple question of what acts amount to occupancy, applied to acquiring right to wild animals.

If we have recourse to the ancient writers upon general principles of law, the judgment below is obviously erroneous. Justinians Institutes, lib. 2, tit 1, s. 13, and Fleta, lib. 3, c. 2, p. 175, adopt the principle, that pursuit alone vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually

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taken. The same principle is recognised by Breton, lib 2, c. 1, p. 8.

Puffendorf, lib, 4, c. 6, s. 2, and 10, defines occupancy of beasts *feræ naturæ*, to be the actual corporal possession of them, and Bynkershook is cited as coinciding in this definition. It is indeed with hesitation that Puffendorf affirms that a wild beast mortally wounded, or greatly maimed, cannot be fairly intercepted by another, whilst the pursuit *of the person inflicting the [*178] wound continues. The foregoing authorities are decisive to show that mere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him.

It therefore only remains to inquire whether there are any contrary principles, or authorities, to be found in other books, which ought to induce a different decision. Most of the cases which have occurred in England, relating to property in wild animals, have either been discussed and decided upon the principles of their positive statute regulations, or have arisen between the huntsman and the owner of the land upon which beasts *feræ naturæ* have been apprehended; the former claiming them by title of occupancy, and the latter *ratione soli*. Little satisfactory aid can, therefore, be derived from the English reporters.

Barbeyrac, in his notes on Puffendorf, does not accede to the definition of occupancy by the latter, but on the contrary, affirms, that actual bodily seizure is not, in all cases, necessary to constitute possession of wild animals. He does not, however, describe the acts which, according to his ideas, will amount to an appropriation of such animals to private use, so as to exclude the claims of all other persons, by title of occupancy, to the same animals; and he is far from averring that pursuit alone is sufficient for that purpose. To a certain extent, and as far as Barbeyrac appears to me to go, his objections to Puffendorf's definition of occupancy are reasonable and correct. That is to say, that actual bodily seizure is not indispensable to acquire

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right to, or possession of, wild beasts; but that, on the contrary, the mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since, thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So also, encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labor, have used such means of apprehending them. Barbeyrac seems to have adopted, and had in view in his [*179] notes, *the more accurate opinion of Grotius, with respect to occupancy. That celebrated author, (lib. 2, c. 8, s. 3, p. 309,) speaking of occupancy, proceeds thus: "*Requiritur autem corporalis quædam possessio ad dominium adipiscendum; atque ideo, vulnerasse non sufficit.*" But in the following section he explains and qualifies this definition of occupancy: "*Sed possessio illa potest non solis manibus, sed instrumentis, ut decipulis, ratibus, laqueis dum duo adsint; primum ut ipsa instrumenta sint in nostra potestate, deinde ut fera, ita inclusa sit, ut exire inde nequeat.*" This qualification embraces the full extent of Barbeyrac's objection to Puffendorf's definition, and allows as great a latitude to acquiring property by occupancy, as can reasonably be inferred from the words or ideas expressed by Barbeyrac in his notes. The case now under consideration is one of mere pursuit, and presents no circumstances or acts which can bring it within the definition of occupancy by Puffendorf, or Grotius, or the ideas of Barbeyrac upon that subject.

The case cited from 11 Mod. 74—180, I think clearly distinguishable from the present; inasmuch as there the action was for maliciously hindering and disturbing the plaintiff in the exercise and enjoyment of a private fran-

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chise; and in the report of the same case, (3 Salk. 9,) Holt, Ch. J., states, that the ducks were in the plaintiff's decoy pond, and so in his possession, from which it is obvious the court laid much stress in their opinion upon the plaintiff's possession of the ducks, *ratione soli*.

We are the more readily inclined to confine possession or occupancy of beasts *feræ naturæ*, within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.

However uncourteous or unkind the conduct of Pierson towards Post, in this instance, may have been, yet his act was productive of no injury or damage for which a legal *remedy can be applied. We are of opinion [*180] the judgment below was erroneous, and ought to be reversed.

LIVINGSTON, J. My opinion differs from that of the court. Of six exceptions, taken to the proceedings below, all are abandoned except the third, which reduces the controversy to a single question.

Whether a person who, with his own hounds, starts and hunts a fox on waste and uninhabited ground, and is on the point of seizing his prey, acquires such an interest in the animal, as to have a right of action against another, who in view of the huntsman and his dogs in full pursuit, and with knowledge of the chase, shall kill and carry him away?

This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone, all of whom have been cited; they would have

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had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor reynard would have been properly disposed of, and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of Diana. But the parties have referred the question to our judgment, and we must dispose of it as well as we can, from the partial lights we possess, leaving to a higher tribunal, the correction of any mistake which we may be so unfortunate as to make. By the pleadings it is admitted that a fox is a "wild and noxious beast." Both parties have regarded him, as the law of nations does a pirate, "*hostem humani generis*," and although "*de mortuis nil nisi bonum*," be a maxim of our profession, the memory of the deceased has not been spared. His depredations on farmers and on barn yards, have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit. Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career. But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of [*181] day, would mount his steed, and for *hours together, "*sub jove frigido*," or a vertical sun, pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honors or labors of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit? Whatever Justinian may have thought of the matter, it must be recollected that his code was compiled many hundred years ago, and it would be very hard indeed, at the distance of so many centuries, not to have a right to establish a rule for ourselves. In his day, we read of no order of men who made it a business, in the language of the declaration in this cause, "with hounds and dogs to find, start, pursue, hunt, and

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chase," these animals, and that, too, without any other motive than the preservation of Roman poultry; if this diversion had been then in fashion, the lawyers who composed his institutes, would have taken care not to pass it by, without suitable encouragement. If any thing, therefore, in the digests or pandects shall appear to militate against the defendant in error, who, on this occasion, was the fox hunter, we have only to say *tempora mutantur*; and if men themselves change with the times, why should not laws also undergo an alteration?

It may be expected, however, by the learned counsel, that more particular notice be taken of their authorities. I have examined them all, and feel great difficulty in determining, whether to acquire dominion over a thing, before in common, it be sufficient that we barely see it, or know where it is, or wish for it, or make a declaration of our will respecting it; or whether, in the case of wild beasts, setting a trap, or lying in wait, or starting, or pursuing, be enough; or if an actual wounding, or killing, or bodily tact and occupation be necessary. Writers on general law, who have favored us with their speculations on these points, differ on them all; but, great as is the diversity of sentiment among them, some conclusion must be adopted on the question immediately before us. After mature deliberation, I embrace that of Barbeyrac, as the most rational, and least liable to objection. If at liberty, we might imitate the courtesy of a certain emperor, who, to avoid giving *offence to the advocates of any of these [*182] different doctrines, adopted a middle course, and by ingenious distinctions, rendered it difficult to say (as often happens after a fierce and angry contest) to whom the palm of victory belonged. He ordained, that if a beast be followed with large dogs and hounds, he shall belong to the hunter, not to the chance occupant; and in like manner, if he be killed or wounded with a lance or sword; but if chased with beagles only, then he passed to the captor, not to the first pursuer. If slain with a dart, a sling, or a bow,

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he fell to the hunter, if still in chase, and not to him who might afterwards find and seize him.

Now, as we are without any municipal regulations of our own, and the pursuit here, for aught that appears on the case, being with dogs and hounds of imperial stature, we are at liberty to adopt one of the provisions just cited, which comports also with the learned conclusion of Barbeyrac, that property in animals *feræ naturæ* may be acquired without bodily touch or manucaption, provided the pursuer be within reach, or have a reasonable prospect (which certainly existed here) of taking, what he has thus discovered an intention of converting to his own use.

When we reflect also that the interest of our husbandmen, the most useful of men in any community, will be advanced by the destruction of a beast so pernicious and incorrigible, we cannot greatly err, in saying, that a pursuit like the present, through waste and unoccupied lands, and which must inevitably and speedily have terminated in corporal possession, or bodily seisin, confers such a right to the object of it, as to make any one a wrongdoer, who shall interfere and shoulder the spoil. The justice's judgment ought therefore, in my opinion, to be affirmed.

Judgment of reversal.[1]

[1] Wild bees in a bee-tree, belong to the owner of the soil where the tree stands. *Ferguson v. Miller*, 1 Cow. 243.

Though another discover the bees, and obtain license from the owner to take them, and mark the tree with the initials of his own name, this does not confer the ownership upon him, until he has taken actual possession of the bees. *Id.*

If he omit to take such possession, the owner of the soil may give the same license to another, who may take the bees without being liable to the first finder. *Id.*

The two parties, both having license, the one who takes possession first, acquires the title. *Id.*

Bees are animals *feræ naturæ*, but when hived and reclaimed, a qualified property may be acquired in them. *Gillett v. Mason*, 7 J. R. 16.

If a person find a tree, containing a hive of bees, on the land of another, and mark the tree, he does not thereby reclaim the bees, and vest a right of

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property in himself; and cannot maintain an action for carrying away the bees and honey. *Id.*

Though property in animal *feræ naturæ* may be acquired by occupancy, or by wounding it, so as to bring it within the power or control of the pursuer; yet, if after wounding the animal and continuing the pursuit of it until evening, the hunter abandons the pursuit, though his dogs continue chase, he acquires no property in the animal. *Buster v. Newkirk*, 20 J. R. 75. N. Y. Dig., vol. 1, p. 106, *et seq.*

HOLLINGSWORTH *against* NAPIER.

If a vendor deliver to his vendee a bill of parcels for goods lying in a public store, together with an order on the storekeeper for their delivery, the vendor's right of stopping *in transitu* is gone against a third person, purchasing *bona fide* for a valuable consideration, and though there be some suspicious circumstances attending the transaction, yet, if they have been fairly submitted to a jury, the court will not intend there was any fraud, so as to warrant a new trial.

TROVER to recover the value of ten bales of cotton, bought under the following circumstances:

The defendant had sold the property in question, which was then lying in the public store at the quarantine ground, to one Kinworthy, for cash, payable on delivery, in consequence of which, a bill of parcels had been made out, marked *in the margin "cash," but contain- [*188] ing no receipt for the money. This, together with an order on the storekeeper for the cotton, had, either by the defendant or his clerk, been given over to Kinworthy. He, without either paying for the articles, or having taken possession of them, met the plaintiff at a public house, and, producing the bill of parcels and order, offered them for sale at the same price for which they had been bought, alleging, as a reason, that he was pushed for money. The plaintiff, on this, agreed to become the purchaser, received the bill of parcels and order, and paid for the goods, by giving a part of the consideration money in cash, and the residue in a check borrowed from a Mr. Peter Hyde.

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Having finished this transaction, Hollingsworth went to the quarantine ground the very next day, but at so late an hour that, from the usual course of business, it was impossible to have shipped the goods that night, and producing the order, demanded the cotton, on the turning out of which to him he paid the amount of storage, had the bales marked with his initials, and then returned into the public store. The morning after this had taken place, the defendant went to the quarantine ground, took the cotton from the storekeeper, and sold it.

At the trial of the cause, the jury, under the direction of the judge, that the order to the storekeeper was a delivery, found for the plaintiff.

The application now was, to set aside this verdict, as contrary to law, and on account of having newly discovered that no person of the name of Peter Hyde had ever kept any account with either of the banks in New-York, and that the defendant hoped, from information related to him, to prove that the cotton had been obtained from him, in consequence of a preconcerted plan between Hollingsworth and Kinworthy, to the former of whom the latter had been long indebted, to satisfy the demand on which account the goods in question had been fraudulently transferred, without any consideration having ever passed at the pretended time of sale.

Caines, for the defendant, argued that the circumstances of the case warranted a presumption of fraud. That Kinworthy having acquired no legal property in the [*184] goods, *either by payment, or taking possession, could transfer none to Hollingsworth, who claimed only by virtue of the order from Napier to the storekeeper, which not being negotiable, must have been taken subject to all the equities that might have been urged against it in the hands of the original holder. That against him the privilege of stopping *in transitu* existed in full force, being founded on legal rights; for, as payment was a condition

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precedent in all sales, stopping *in transitu* was a legal right depending on the laws of property. *Couper v. Andrews*, Hob. 41.; *Burghall v. Howard*, 1 H. Black, 365, (n).; *Openheim v. Russell*, 3 Bos. & Pull. 49. It therefore will support trover. *Bothlingk v. Inglis*, 3 East, 381. That, consequently, the only right the plaintiff could acquire by the purchase, was an equitable one, in virtue of his consideration money paid; but that, as equitable claims could never overreach legal titles, the right of the defendant was as good against Hollingsworth as against Kinworthy. As to the marking with initials, turning out of the store, &c., that, he said, was immaterial; the same things had been done in *Hodgson v. Loy*, 7 D. & E. 460. The true question was, had the articles reached their destination? for till then every delivery(a) was constructive, and never affected a legal right.

(a) What shall, in law, amount to a delivery, has been an ample source of forensic discussion. Perhaps the question will be most easily understood, by considering it, first, as between vendor and vendee; secondly, as between the vendor and the assignee of his vendee.

As between vendor and vendee; first, under the statute of frauds to charge on the contract of sale, and put at the risk of the vendee, and when not; next, when sufficient to destroy the right of stopping *in transitu*, and when not.

To charge on the contract of sale, and put at the risk of the vendee, a constructive delivery alone is enough. An actual delivery neither in law, nor in fact, is required. If it be such as to pass the entire right of property, it will suffice; therefore, to such purpose a constructive delivery and acceptance is adequate; (*Rondeau v. Wyatt*, 3 Bro. Ch. Rep. 154,) though it be only of a sample, if the sample constitute a portion of the bulk of the article sold. *Hinde v. Waterhouse*, 7 East, 558. So a mere symbolical delivery, as that of the key of a warehouse where the goods are deposited, (*Ryall v. Rolle*, 1 Atk. 171; *Chaplin v. Rogers*, 1 East, 195, per Lord Kenyon,) especially when accompanied with the warehouseman's receipt for them, and an acknowledgment that they are held on account of the vendee. *Wilkes & Fontaine v. Ferris*, 5 Johns. Rep. 335. Of the same effect is the exercise of any act of ownership over the subject matter of sale, either immediately by the vendee, or mediately through his agents or the vendor; as by forwarding according to the vendee's order, either by a general carrier, or one specially nominated by him, (*Godfrey v. Furzo*, 3 P. Wms. 185; *Snes v. Prescott*, 1 Atk. 248; *Vaile v. Bayle*, Cowp. 294; *Dawes v. Peck*, 8 D. & E. 330; *Potter v. Lansing*, 2 Johns. Rep. 215; *Brown v. Hodgson*, 2 Camp. 36;) packing according to his directions, (*Lickbarrow v. Mason*, per Lord Loughborough, 1 H. Black.

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If otherwise, the doctrine of stopping *in transitu* was at an end, as every delivery within the statute of frauds would take it away, and such a position was in the face of every

363, 364,) putting his initials or marks on them, (*id. ibid.*) or permitting him to affix them himself, (*Knight v. Hopper*, Skin. 647; *Hodgson v. Le Brett*, 1 Camp. 233;) or to cut off the spills or pegs of casks; (*Anderson v. Scott*, 1 Camp. 235;) *a fortiori* if he proceed to make a sale, though but of a part, (*Chaplin v. Rogers*, 1 East, 192;) for such conduct is tantamount to, and operates as delivery and acceptance, (*Knight v. Hopper*, *ubi sup.*) of which it supersedes the necessity of evidence. *Chaplin v. Rogers*. But as in the antecedent cases, the delivery and acceptance are merely constructive, arising by implication, and *expressum facit cessare tacitum*, if at the time of the above enumerated acts, either the vendor declares that he does not assent to the sale till the price of the goods be paid and they continue in his possession, (*Goodall v. Skelton*, 2 H. Black. 316,) or the vendee refuse to accept, because the goods delivered do not correspond with his order, (*Kent v. Huskinson*, 3 Bos. & Pull. 233,) neither the presumption of delivery nor of acceptance can be made; nor will the marking of goods by a vendee who has bought in bales, extend to the other article bought at the same time but not marked, (*Hodgson v. Le Brett*, 1 Camp. 233,) nor the delivery of a sample, where it is not a part of the bulk of the commodity sold, (*Cooper v. Elston*, 7 D. & E. 14,) work a delivery under the statute.

It may not, perhaps, be incorrect to say, that every delivery to charge on a contract of sale under the statute of frauds, is a delivery to put the article purchased at the risk of the vendee. Therefore, if it be delivered according to order, either to a master of a vessel, or a carrier (*Brown v. Hodgson*, and *Potter v. Lansing*, *ubi sup.*) though the carriage is to be paid by the vendor, the article is at the risk of the vendee. *King v. Meredith*, 2 Camp. 639. So when paid for, and left in the possession of the seller. *Lansing & Lansing v. Turner & Stafford*, 2 Johns. Rep. 16. The law is the same, if the contract of sale be complete, though the goods continue in the warehouse where stored at the time of sale, under an agreement to be free of storage a certain number of days, during which they are burnt, and before expiration of the credit on which sold, (*Phillimore v. Barry*, 1 Camp. 513,) the exemption from storage being only a part of the consideration for the purchase. So where the vendor has not any further act to do, whether to ascertain the quantity, quality, or price of the article sold, the vendee must bear every loss by destruction or deterioration of the commodity, though it happen on the spot where sold, and from whence he could not remove it till payment of the duties by the vendor, provided, in consequence of the office hours at the custom-house, an opportunity of discharging them has not offered. *Hinde v. Waterhouse*, 1 East, 558. But where, under a contract of sale, any thing remains to be done by the seller of goods, in order to render them capable of delivery according to its terms, a loss posterior to the agreement for the

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determination on the point, in all of which a constructive delivery had uniformly taken place. The affidavit also showed fresh grounds.

purchase, and prior to the doing such act, will be at the door of the vendor. If, therefore, weighing be necessary to ascertain the number of hundredes, (*Hanson v. Meyer*, 6 East, 614,) or some casks remain to be filled up, in order to make them of the weight at which they are to be taken, (*Rugg v. Minch*, 11 East, 210,) or the contents of bales are to be counted, (*Zugury v. Furnell*, 2 Camp. 240,) or it be the duty of the seller to perform any other act for ascertaining the quantity, quality, or price of his commodity, it is, for such part as is not so ascertained, at his risk, though the remainder will be at that of the purchaser.

A mere agreement with a vendor for the amount of storage of goods which are the object of sale, and a delivery by him of the import entry to the agent of the vendee to enable the purchaser to make an export entry, does not amount to such a delivery under the statute, as will charge him with the loss. *Bailey & Boyert v. Ogden*, 3 Johns. Rep. 393.

A delivery of goods in order to divest the vendor of his right to stop *in transitu*, must be an actual delivery in law, or in fact. It follows, from the above position, that so long as the property is at the risk of the seller, the right of stopping *in transitu* exists. *Hanson v. Meyer*, 6 East, 614. It is defeated neither by paying earnest, nor part of the purchase-money, nor by marking with initials at the place of sale from whence to be sent, nor by delivery for the purpose of transmission to a general carrier, or one specially nominated by the vendee, nor by arrival at a wharfinger's at the very port of destination, nor by an agreement that the purchaser shall pay the carriage or freight, nor by being entered in the books of a carrier or warehouseman, as the property of the vendee, nor even by his taking possession while on the road to the place of destination, (*Hodgson v. Loy*, 7 D. & E. 440, and the cases cited there,) nor by delivery to a wharfinger appointed by the vendee for the purpose of being forwarded, (*Smith v. Goss*, 1 Camp 282.) nor by an attachment at the suit of a creditor while on the route, (*id. ibid.*) nor even by arriving at the termination of the journey, if lodged by officers of the revenue in public warehouses to secure payment of duties, nor, as to the net proceeds, even by a sale for payment of them, (*Northey & Lewis v. Field*, 2 Esp. Rep. 613,) nor by the actual possession of the vendee at the termination of the *iter*, if taken from him to be placed in quarantine, (*Holt v. Pownall*, 1 Esp. Rep. 240,) nor by payment of warehouse rent, at the wharf where the goods arrive. Per Chambre, J., in *Hammond v. Anderson*, 1 N. R. 72.

But when the delivery has been actual, though only in law, as by an order on a storekeeper in favor of the vendee to hold for, or deliver to him, (*Searle v. Keeser*, 2 Esp. Rep. 598,) though the goods be not passed to his credit, and the storekeeper has not acknowledged to hold them for him, (*Horman and others v. Anderson*, 2 Camp. 243,) or they are to be stored for

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Woods and Hoffman, contra. Fraud is a matter of fact; there are, to be sure, certain circumstances from whence it may be inferred, but there are none such in the present case, and they must be very strong to take it from the jury to the court. Besides, due diligence is not shown, and the facts detailed rest more on the defendant himself than other persons. As to the right of stopping *in transitu*, the order on the storekeeper was tantamount to an actual

several days to come, at the charge of the seller, (*Hammond v. Anderson*, 1 N. R. 62,) and there be no further act to be done by the vendor in order to ascertain quantity, quality, or price, (*Hanson v. Meyer*, *ubi sup.*) or there be, after a part delivery, a further act to be done, but by the vendee and for his satisfaction, (*Shubey v. Haywood*, 2 H. Black. 504. *Blakeney v. Dimsdale*, Cowp. 664,) or the goods have arrived at the place of their destination, and have been taken possession of, by the affixing of initials, (*Ellis v. Hunt*, 3 D. & E. 466,) either by the vendee his agent, or representative, or by any other act indicative of an exercise of ownership over them, (*Wright v. Lawes*, 4 Esp. Rep. 82,) or have been received by the vendee or his agents at the place to which ordered, though for the purpose of an ulterior destination by the vendee, (*Dixon v. Baldwin*, 5 East, 175; *Scott v. Petit*, 3 Bos. & Pull. 469, and the cases there,) or have been laden on board a ship, chartered by the vendee, (*Fowler v. M'Taggart*, 7 D. & E. 442,) or have come into the actual possession in law of the vendee, by the seller's receiving storage for them, though remaining in his warehouse where sold, (*Hurry v. Mangles*, 1 Camp. 462,) or have come into the possession in fact of the vendee, by delivery at his house, according to his order, though purchased for ready money, if no objection be made on account of non-payment, (*Harwell v. Hunt*, 5 D. & E. 231,) the right of stopping *in transitu* is at an end.

As against the second vendee, the right must necessarily be gone, whenever it is lost against the first. But though goods be so situated that against the primitive vendee the right may be exercised, yet, if, while they are so circumstanced, he dispose of them, and the original vendor by any act ratify such sale, it will divest him of the right to stop; as if he accept an order in favor of the second vendee for even an unseparated portion of the article sold, (*Whitehouse and others v. Frost*, 12 East, 614,) or, after information of a sale by his vendee, permit the second vendee to mark the residue of the articles not forwarded, while the others are on their route, (*Stovel v. Hughes*, 14 East, 308,) or, as it would seem, do any other act acknowledging to the second vendee his assent to the disposition in his favor.

The right of stopping *in transitu* is, as urged by the counsel for the defendant in the text, "a strictly legal right depending on the laws of property," and allowed on that ground by Lord Hardwicke, in *Snes v. Prescott*, as is expressly said by Lord Loughborough, in 1 H. Black. 364. If there be not any

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delivery, (1 Lex Mer. Amer. 376, 377, and the cases there cited.) If so, Kinworthy was in possession, and his sale of course effectual. But allowing the delivery to be only constructive, an assignee of the person to whom it was made, and who is *a bona fide purchaser, is [*185] protected by it. *Lickbarrow v. Mason*, on a bill of lading, Abbott, 314. The goods might indeed be said to have been delivered by Napier himself, for it was his agent who gave them up to the plaintiff.

Harrison, in reply. The delivery here relied on, would have been good as between the original parties, Napier and Kinworthy, had either one of them come here to enforce the contract, and claim either the money or the goods, by paying the one, or tendering the other. This would have been by virtue of the statute of frauds, and it is to that effect that the cases in the book referred to are mentioned. But though this would be a good delivery between the immediate parties, one claiming against the other the benefit of his contract, it does not follow that it can be established between third persons, so as to take away the right of stopping *in transitu*. Such interest as Kinworthy had, he sold. That interest was one liable to stoppage in transit; of course his vendee took it subject to the same liability. There is no hardship in this; the rule is *caveat emptor*. Had Kinworthy reduced the property into possession, the case would have been different. It is plain a fraud has been committed on the defendant, and he ought not to be precluded from an opportunity of showing it. As to the store-

right of property there cannot be any right to stop *in transitu*; therefore, it cannot be exercised by a person who had only a lien on the goods; (*Swess v. Pym*, 1 East; 94;) but where there is a right of property, the exercise of that of stopping *in transitu* does not take away the right of proceeding for the recovery of the value of the goods, by an action for goods sold and delivered, if the vendor be ready to permit their delivery on being paid; (*Kymer v. Sewercroft*, 1 Camp. 109,) the right of stopping *in transitu* being merely ancillary to that of recovery.

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keeper being the agent of Napier, and therefore the goods virtually delivered by Napier himself, let it be remembered, the cotton was returned to that storekeeper, and if the reasoning of the plaintiff's counsel be good, it was returned into the possession of the defendant,^(a) who surely had a right to sell, or detain till his consideration money was paid.

SPENCER, J., delivered the opinion of the court. The court are applied to for a new trial in this cause, on the facts stated in the case, and on discovery of new evidence. The plaintiff derives his title to the goods in controversy under Kinworthy, and the questions are, whether his fraud infects the plaintiff's title? whether possession followed the sale, so as to destroy the defendant's right to stop the goods *in transitu*? and whether the case is free from the operation of the statute of frauds?

The question of fraud was fairly submitted to the jury.

Their verdict shows that they believed the plaintiff, from the evidence before them, was not a party in Kinworthy's fraud on the defendant, and we cannot perceive any reasons for questioning the conclusions drawn by the jury. Fraud is odious, and never to be presumed. The circumstances set up, on which it is to be founded, are too light and evanescent. On this point, therefore, the defendant's application fails.

The plaintiff having, as it must now be intended, fairly gotten possession of the order for the cotton,^(b) received a delivery of it, and paid the storage. This acquiring of possession took away the defendant's right to stop *in transitu*. The order itself is a delivery, so as to prevent the operation of the statute. *Scarle v. Keeses*, 2 Esp. Rep. 598. But again, the sale is wholly free from that objection, by

(a) If goods when sold remain in the possession of the vendor, who receives warehouse rent for them, it is a delivery. *Herry v. Mangles*, 1 Camp. 452.

(b) *S. P. Harman and others v. Anderson*, 2 Camp. 243; *Stonard v. Dunkin and another*, *ibid.* 344.

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the delivery of possession under it. With respect to the facts upon which the defendant relies for a new trial, on the discovery of evidence, it is to be observed, that the former was had in December last. It would be too loose to set aside the verdict on the mere expectation of a party's being better prepared. There has been abundant time for the defendant to lay before us the facts in the knowledge of his witnesses. This ought to be done on all applications for new trials on discovered testimony; or, if omitted, good reason ought to be given for the omission. To listen to the application on this ground, would be to grant new trials wherever the party was dissatisfied with the verdict. The facts ought to be strong ones to induce the court to grant a new trial on the discovery of evidence, and the case should be free from laches. In the present instance, the defendant is chargeable with delay, and the facts that he expects to prove, for ought that appears, rest in his own credulity.

If it should be admitted that Hyde never kept an account with the banks, it does not follow that the testimony given on the trial is untrue. The witnesses did not say that Hyde drew the check, but that he loaned one. This might be, and it is to be presumed was, a check drawn by some other person. Our opinion is, that the defendant take nothing by his motion.

New trial refused.[1]

[1] It is not necessary, in order to terminate the vendor's right of stoppage *in transitu*, that the goods, after arriving at the place of delivery, should have come to the corporal possession of the consignee; a constructive possession, or the exercising of acts of ownership by him after such arrival, is sufficient. *Mottram v. Hoyer*, 1 Denio, 483.

The vendee on a day certain received bill of lading, and paid freight, the goods then arriving in New York; some days afterwards they were entered at the custom-house, and taken to the public store; while there, and before the duties were paid, the vendee became bankrupt, and the plaintiff demanded the goods; held, that the *transitus* had ended, and the plaintiff had no right to demand the goods, freight having been paid, and entry for duties made. *Id.*

Where a party, residing at a distance from his correspondent, ordered a quantity of merchandise, directing it to be forwarded to an intermediate

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place, and the goods were accordingly forwarded, and after their arrival at the intermediate place were delivered to a common carrier employed by the purchaser, and before reaching the residence of the purchaser, the vendor resumed the possession on the ground of the insolvency of the purchaser; it was held, that the goods not having arrived at the place of their final destination, the *transitu* was not ended, and the vendor had the right to stop and retain them until their price was paid. *Buckley v. Farness*, 17 Wen. 504; S. C., 15 Wen. 137.

It seems that the right of stoppage *in transitu* is not divested by the goods being seized or levied upon by virtue of an attachment or execution at the suit of a creditor of the purchaser, where the right is exercised by the vendor before the *transitu* is at an end. *Id.*

It seems that a vendor is not entitled to exercise the right of stoppage *in transitu*, if, at the time of the sale of the goods, he knows the purchaser to be insolvent. *Id.*

Semble, that the mere lapse of time is a circumstance of no importance in determining the right of the vendor to resume possession of the goods, provided the right be exercised before the *transitu* is at an end. *Id.*

Where a delivery to a carrier or other agent is for the very purpose of conveyance to the purchaser, the right of the vendor to stop the goods continues until they come to the actual possession of the vendee, or reach the end of their journey. *Id.*

So while they remain in the hands of a warehouse man, at the place to which they were directed, but still not the ultimate destination of the goods; the vendee living thirteen miles from the warehouse. *Copple v. Hitchcock*, 23 Wen. 611.

Where goods are to be paid for on delivery, if on delivery the vendor refuses to pay for them, the vendor has a lien for the price, and may resume the possession of the goods. *Palmer v. Hand*, 13 J. R. 434.

And if, during the course of delivery, and before it is completed, the vendee sells or pledges the goods to a third person for a valuable consideration, without notice to the original vendor, the lien of the latter will not be affected, and he may recover the goods from the subsequent purchaser. *Id.*

If the vendee become bankrupt, the vendor may stop the goods *in transitu*. *Chapman v. Lathrop*, 6 Cow. 110.

The act of stoppage *in transitu*, is, in its nature, adverse to the vendee; and the doctrine on that subject does not apply, where the vendor and vendee are agreed that the property shall be reclaimed; for it is then a question of reconveyance or rescission. *Ash v. Putnam*, 1 Hill, 302.

If the vendor give the vendee an order on a store-keeper, in whose possession the goods are, for their delivery, his right of stoppage *in transitu* is determined. *Hollingsworth v. Napier*, 3 Cal. R. 183.

Where a vendee sells goods to a *bona fide* purchaser for a valuable consideration, the right of the vendor to stop them *in transitu* is determined. *Hunn v. Bowns*, 2 Cal. R. 33.

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So where A. sold goods to B. on a credit of sixty days, and took B.'s note payable in that time, B. afterward sold them to C., and gave him an order on A. for their delivery, which was not immediately presented, nor was A. informed of the sale. B. became bankrupt, and A. placed his notes, together with the goods, in the hands of B., as security for a debt due him from A. C. afterward demanded the goods from A., who refused to deliver them, alleging as a reason the bankruptcy of B., and the non-payment of his note; held that C. might maintain trover against D. for the goods; the lien of A. not being sufficient to protect his assignee against a *bona fide* purchaser from the original vendee. *Id.*

One of two partners purchased goods without the privity of his co-partner; and the latter, on learning the fact, proposed by letter that the vendors should have the goods again, which proposal was accepted before the goods had reached the vendees; held, that the sale was thereby rescinded, and the goods could not be subsequently seized in virtue of an execution against the vendees. *Ash v. Putnam*, 1 Hill, 302.

Under such circumstances, the general and absolute ownership remaining in the vendor, not only the original interference with the property on the part of the vendee, but any subsequent acts of ownership by him, may be treated as an unlawful or tortious taking. *Id.*

The delivery and payment should be simultaneous acts; for on a cash sale of goods, the vendee is not entitled to the possession till he pays the price. *Clarkson v. Carter*, 3 Cow. 84.

After earnest paid, the vendee cannot sell the goods to another without fault in the vendee; and if the vendee does not come and take away the goods, the vendor ought to go and request him; and then, if the vendee does not come in convenient time, and pay and take away the goods, the agreement is dissolved, and he is at liberty to sell them to any other person. *Id.*

In the language of Ch. J. Kent, "it would be unreasonable to oblige him (the vendor) to let articles perish on his hands, and run the risk of the solvency of the buyer." *Sands v. Taylor*, 5 J. R. 410.

On a sale of goods obtained fraudulently, for the price of which the buyer gave his own bill; the seller, on the discovery of the fraud, took the goods out of the possession of a third person, with whom the buyer had deposited them, without offering to give up the bill to such person, or sending it to the buyer, who was at a distant place; held, that the depository had no claim for a delivery of the bill, and that the seller might retake the goods, without first tendering the bill to the buyer. Held also, that it was competent for him to offer to deliver the bill at the trial; and when such offer appeared to have been omitted inadvertently, and the merits had been tried, leave was given to the party to cancel and return the bill on the argument. *Nellis v. Bradley*, 1 Sandf. 560. 4 N. Y. Dig., pp. 1049, 1050.

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*EBEL against SMITH.

If a plaintiff before a justice declare generally against a defendant, that he was "indebted," and then delivered a book account to the justice, *that* account will be taken as part of his declaration, and if it appear on the return to have been for tavern expenses, the plaintiff ought to show that the defendant was within some of the exceptions in the 13th section of the tavern act; *aliter*, if the plaintiff do not himself show that the demand was for tavern expenses, for then the defendant must bring himself within them. On *certiorari*, error-books may be delivered to the judges, but they will not be allowed for on taxation.

IN ERROR, on *certiorari*, the return set forth the warrant to have been directed to the constable of the town where the defendant "dwelt," and that the plaintiff below, after declaring generally that the defendant was indebted to him, delivered to the justice a book account, the greater part of which was for tavern expenses. To this the defendant pleaded in bar the 18th section of the tavern act, restricting inn-keepers from trusting any persons, other than travelers, for a larger sum than 1 dollar and 25 cents, for strong or spirituous liquors, or other tavern expenses. The justice, however, went on to trial, and the jury brought in a verdict in favor of the plaintiff, for 25 dollars, of which sum they found 8 dollars and 82 cents to have been for spirituous liquors.

Gold assigned as reasons for reversal, that on the face of the record it appeared the action was not maintainable, and also that the oath administered to the constable was not to keep the jury "together," but only to keep the "inquest in some private" place. This last objection, he contended, was, on the authority of the eighth resolution in *Day v. Wilber*, (2 Caines' Rep. 187,) fatal.

Simonds, contra, insisted, that as the cause went to a jury, it must be intended the defendant was proved to have been

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a lodger in the tavern, and therefore within the exception of the 14th section.

Gold, in reply, said no intendment could be made against the record, and by that it appeared the defendant below "dwelt" in the town to the constable of which the warrant was directed.

Per Curiam. This case comes before the court on *certiorari*. Several exceptions have been taken in the return. We shall confine ourselves to that which relates the declaration. See *Houghton v. Strong*, (1 Caines' Rep. 486.)

The account delivered must necessarily be taken as the plaintiff's declaration, otherwise, he sets forth no specific demand to which the defendant could answer. Although a plaintiff in a justice's court ought not to be held to technical niceties in declaring, yet he ought to make it appear that he has a sufficient foundation for bringing his action, *and not, by his own showing, disclose [*188] that his demand was illegal.[1] By the general terms, "tavern expenses," the court must necessarily intend such charges as are prohibited in the section of the act pleaded in bar. Had he declared generally on a common book account, it might have been incumbent on the defendant to show that the account was for tavern expenses, and the court here might intend, in favor of the judgment, that he failed in doing that. But when the declaration states the demand to be tavern expenses, it lay with the plaintiff to disclose that the defendant was "a traveler or lodger in his house," in order to bring his account within the exceptions in the act, and give him a right of recovery. Not having done this, his demand, from his own showing, was illegal, and the judgment in the court below cannot be maintained; more especially as it appears expressly by the return, that three dollars and eighty-two cents of the re-

[1] See *Waterman's N. Y. Treatise*, p. 85, *et seq.*

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covery were for tavern expenses. This precludes us from making any intendment that the illegal charges were rejected.

Judgment reversed.

N. B. *Gold* delivered error-books to all the judges, who said this was not prohibited from being done, but that they would not be allowed for on taxation.

JACKSON, *ex dem.* KLEIN, against GRAHAM.

In ejectment by a purchaser under a sheriff's sale, against the debtor, who refuses to give up possession, the defendant cannot show title in another, for the plaintiff comes into exactly such estate as the debtor had, and if it was a tenancy, the plaintiff will be tenant also, and estopped in a suit by the landlord, from disputing his right in the same manner as the original tenant, who becomes *quasi* tenant at will to the purchaser.

THE plaintiff in this action showed title by a regular conveyance from the sheriff of the county, under an execution upon a judgment in this court, signed and docketed on the twenty-third of October, 1802. He further established that before the entry of the judgment, the defendant had been, and then was, in possession of the premises.

To rebut this testimony the defendant offered to prove that one Ira Day was the real owner of the land; and for this purpose produced a deed for the very subject of controversy, duly executed on the 15th of April, 1802, by himself and wife, to Day. He further tendered witnesses to establish that at the time of sale, Day claimed the premises, and publicly forbade the sheriff proceeding in it; that Graham disclaimed all interest in the premises, and that the name of Day was originally inserted in [*189] the consent rule, *but had, by consent of the attorneys, been changed to that of the defendant, under a verbal agreement, however, to try the title of Day alone.

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The whole of this evidence being rejected by the judge, he directed the jury to find for the plaintiff, which they accordingly did.

The application was to set the verdict aside, and grant a new trial.

Williams, for the defendant. In ejectment, the plaintiff must recover on the strength of his own title, and his adversary may, therefore, show it to be in another. The testimony offered would have done this, and proved Graham a mere tenant at will. If so, he had no legal transferable interest, either by his own act, or operation of law. The instant his estate was defeated, that of his landlord vested, disencumbered of all claims in virtue of the previous tenancy. Suffering the plaintiff to retain his verdict will be only exposing him to another suit, in which he must be ejected.

Foot and Van Vechten, contra. A third person cannot interpose after a sheriff's sale of property in the possession of a defendant. All that we claim is such right as Graham had in the premises. He clearly had some, for he was in possession. At least, the emblements were the defendant's; and to those we must be entitled, as well as to six months' notice to quit. We do not disturb the landlord's estate.

Williams, in reply, urged that a tenant at will could not insist on notice, nor was he, in a case like the present, entitled to emblements.

Per Curiam. We are all of opinion that the testimony offered by the defendant was properly rejected. The interest of Graham was sold; this cannot prejudice the right of the landlord. A defendant under an execution becomes *quasi* tenant to the purchaser, and if the defendant held only at will, the landlord might the very next day bring

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his action, and the vendee would be estopped from setting up a right in a third person. It is plain, therefore, that the landlord can sustain no kind of injury. The same principle was settled in *Kane v. Steenbergh*, decided in October term, 1799, in which we held a defendant under a sheriff's sale, became *quasi* tenant at will to the purchaser, and that it was not to be presumed he held adversely.

Judgment for the plaintiff.

[*190] *HAFF *against* SPICER and POTTER.

If an affidavit begin with a deponent's name it is a good signing.

STARR took an exception to the affidavit on which the defendant moved, because it was not subscribed by him.

Per Curiam. It begins with his name, and that is sufficient.

SCHERMERHORN *against* SCHERMERHORN.

Judgments in the common pleas may be set off against those in this court.[1]

IN this cause a judgment in the common pleas was allowed to be set off against one recovered in this court.(a)

[1] The supreme court will order a judgment before a justice, to be set off against a judgment of that court, upon the same principles as they will a judgment of the C. P. *Ewen v. Terry*, 8 Cow. 126; *Kimball v. Munger*, 2 Hill, 364.

(a) The statute authorizing set-offs, applies only to mutual debts existing previously to action brought. The equity, however, of its provisions were so apparent, that the courts of law soon began to extend its principles to all

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cases before them, which, though out of its letter, were within its spirit, and refused to lend their aid to enforce, by final process, any demands against a party who had, in the course of either the individual or another suit, obtained a legal claim against his adversary. Thus, the costs of setting aside an irregular *ca. sa.* sued out against the plaintiff on a judgment of non-suit, will be allowed to be set off against the amount of a regular *fi. fa.* which had previously issued against him for the same costs; (*Wills v. Crabb*, Bull. N. P. 336;) so the costs of the verdict against those of another; (*Sciffin v. Robinson*, cited 2 Black. 827;) or those due from the plaintiff, on a judgment of non-suit in ejectment against the amount of a verdict recovered by him for use and occupation; (*Thrustout v. Crafter*, 2 Black. 826;) or those of a judgment by default against one on a verdict. *Glaister v. Hever*, 3 D. & E. 69. The rule is the same, notwithstanding the non-suit be in one court and the verdict to another. *Hall v. Ody*, 2 B. & P. 28.

Where the demands are *in auter droit*, if in the same right, the courts will equally interfere. Therefore, a judgment due from an administratrix in right of her intestate, will be set off against one recovered by her in the same right; (*Barker v. Barham*, Black. 896, 3 Wils. 396;) and although the demands, as being joint and several, are not, strictly speaking, due in the same right, yet if the legal or equitable liabilities or claims of many, become vested in, or may be urged against one, they may be set off against separate demands, and *vice versa*. Thus, as on a judgment by one against several, the amount recovered is a debt due from each, if in a cross action by one of the several, there be a judgment against the plaintiff in the original suit, it may be set off against that which he has obtained, (*Roberts v. Biggs*, Bull. N. P. 336; *Barnes*, 146, S. C.) especially if such plaintiff be insolvent. *Dennis v. Elliott and others*, 2 H. Black. 587. So against a judgment by one, the amount due on a judgment in favor of the defendant, from the plaintiff and another, when such other is insolvent and has absconded. *Mitchell v. Oldfield*, 4 D. & E. 123. For, in all these cases, the entire amount asked to be set off was absolutely due from him who applied to make it, though paid by discounting or setting off a separate debt due to him. It is, in truth, an equitable adjustment of accounts, by which the court allows one party to protect himself from the separate demand of another, by a credit in the joint account against him. The same rule is adopted, though the right be merely equitable. Therefore, the costs of a non-suit to which a party is equitably entitled, by defending the action at the expense of himself and another, though they do not appear on the record, may be set off against the costs of a non-suit due to the plaintiff in the original cause in an action against him by one of the two, but in which both are interested. Thus, *trover* by one against a master of a ship owned by two, at whose expense the suit was defended, and non-suit, *assumpsit* by one of the owners as indorsee of a note made by the plaintiff in trover, in which note the other owner was jointly interested, and non-suit. The costs due to the plaintiff in trover, in the action against him as maker of the note, may be set off against those due from him in the action of trover. *O'Connor v. Murphy*, 1 H. Black. 667.

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In allowing this set-off under the equitable jurisdiction of the court, it has been *vezata questio* how far the *lien* of the attorney for his costs in the suit shall attach. In *Spence v. White*, 1 Johns. Cas. 102, the *lien* of the plaintiff's attorney was not held to attach on the damages recovered till after the costs taxed to the defendant in consequence of the recovery being under fifty dollars, were set-off. It follows, therefore, according to that decision, that the set-off of the party for his costs, is against the damages, paramount the attorney's *lien* on them for his costs, which attaches only on the net balance after the set-off made.

In *Cole v. Grant*, and three other causes, 2 Caines' Rep. 105, the costs of the defendants in the three first suits were set off against the damages in the fourth, but not against the costs taxed to the plaintiff in that suit, for on such the *lien* of his attorney was held paramount the right of set-off. In *Devoy v. Boyer*, 3 Johns. Rep. 257, a verdict for the defendant in a third suit was not allowed to be set off against the amount recovered in two other suits, till the *lien* of the plaintiff's attorney for his costs in them was first satisfied; the court saying "The costs of the attorney for the plaintiff in the two first suits must be paid; he has a *lien* for them which ought not to be affected by the set-off; it was so decided in the case of *Cole v. Grant*, and that must govern our decision in the present case."

In *Potter v. Lane*, 3 Johns. Rep. 357, the rule of *Spence v. White*, was confirmed.

In Westminster-Hall the practice of the Common Pleas and the K. B. differ. In the former, costs alone may be set off against damages and costs; therefore, on a judgment by default against two of three defendants, the costs taxed on the *poetas* to the third (who had a verdict in his favor) may be set off against the damages and costs due from the two; the *lien* of the plaintiff's attorney attaching only on the net balance. *Schook v. Rolle and others*, 1 H. Black. 23. In the K. B. on both damages and costs the attorney has a *lien* which must be satisfied before the set off will be allowed. *Mitchell v. Oldfield ubi sup.* and the cases cited there, and in the note. It may, perhaps, be the intention of our court to steer a middle course. To allow the *lien* of the attorney on the costs taxed, but not on the damages recovered. On the practice of the common pleas Lord Eldon has observed, "that it stands in contradiction to the practice of every other court, as well as to the principles of justice." 2 B. & P. 29. To that practice, however, *Potter v. Lane* is conformable, and in favor of it Rooke, J., says, as "the attorney looks, in the first instance, to the personal security of his client, and if beyond that he can get any further security into his hands, it is a mere casual advantage," the practice of confining his *lien* to the net balance does not appear to be unfair. See *Brown v. Cushing*, 2 Caines' Rep. 33, n. (a)

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HAUGHTALLING *against* BRONK.

If an elector, returned on the grand assize, leave the state, the court will grant a rule to add another to the panel.

VAN VECHTEN, on an affidavit in a writ of right, setting forth that one of the electors, returned on the grand assize, had left the state, moved to amend the panel by adding another.

Per Curiam. As there is no opposition, take your rule.

THOMPSON, J. I do not see how it is possible for the court to grant the motion. If they do, the elector will be appointed contrary to the act, and all proceedings under such a panel consequently void. My opinion is, that you should have a new elector appointed in the same way as the others. I think we have a power to order the sheriff to summon another panel; but I do not think we can direct another elector to be added.

Rule granted.

HASTIE and PATRICK *against* DE PEYSTER and CHARLTON.

On a re-assurance no abandonment is necessary, though the primitive assured has abandoned to his insurer; and the re-assurer is liable to the assurer for all costs, &c., *bona fide* incurred in defending the suit by the original underwritten, especially when, with notice of it going on, he stands by, and does not offer to settle; for as the re-assurer is entitled to every defence against the insurer, which he may urge against the primitive assured, it becomes necessary for the original underwriter to show he has been obliged to pay, on a just claim against him, and he will be entitled to interest on all he has expended and paid.[1]

THIS was an action on a policy of re-assurance, in which a verdict for 1,049 dollars and 26 cents was entered by

[1] An administrator who has purchased a judgment against a plaintiff since the rendition of a judgment against him for a debt owing by the intestate,

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consent, in favor of the plaintiffs, subject to the opinion of the court on the following case.

Hastie and Patrick underwrote 1,000 dollars of the primitive assurance upon the body of the brig Sally, on a voyage from Malaga to New York. During its prosecution the vessel was captured, carried into a port [*191] in St. Domingo, and *whilst there, Warren, the assured, abandoned to the plaintiffs, who refused

will not be allowed by the court in the exercise of its equitable powers, to set off such judgment. *Hills v. Tullman's adm'r*, 21 Wen. 674.

A defendant against whom a verdict is rendered for nominal damages, in an action of tort, may, after the verdict, procure an assignment of a judgment against the plaintiff in a suit in which the verdict is rendered, and may claim to set off such judgment against the judgment entered upon the verdict, although such latter judgment consists entirely of costs, with the exception of the nominal damages, notwithstanding the lien of the attorney. *The People v. New York Common Pleas*, 13 Wen. 649.

If the defendant in an execution escape, the plaintiff is remitted to his former rights, the imprisonment is no longer a satisfaction, and the plaintiff may use judgment as a set-off against a demand of the defendant, or proceed anew against his person or property. *M'Guinty v. Herrick*, 5 Wen. 240.

In directing a set-off of judgments, courts of law proceed upon the equity of the statute, authorizing set-offs. *Simpson v. Hart*, 14 J. R. 63.

Their power consists in the authority they hold over suitors in their courts; and it may be fitly said, that the exercise of the power is the exercise of the law of the courts rather than any known, express, and delegated power. *Id.*

Suitors may ask the interference of courts of law, in effecting a set-off, not *ex debito justitiae*, but *ex gratia curiae*. *Id.*

In a court of equity, it is otherwise. It is a power incidental to that court, and has been long exercised exclusively; for it is but lately that courts of law have undertaken to set off one judgment against another. *Id.*

A note cannot be set off against a judgment. *Ex parte Bagg v. Jefferson C. P.*, 10 Wen. 615.

If a defendant in execution escape, the plaintiff is remitted to his former rights, the imprisonment is no longer a satisfaction, and the plaintiff may use the judgment as a set-off against a demand of the defendant, or proceed anew against his person or property. *M'Guinty v. Herrick*, 5 Wen. 240.

Where such judgment is insisted on as a set-off, and submitted and passed upon by a jury, whether the same be allowed or not, the judgment is extinguished and the plaintiff concluded; and if the plaintiff subsequently sues out execution upon such judgment, he is a trespasser. *Id.*

To take a case out of the rule that a set-off thus submitted is conclusive

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to accept; an agreement, however, was entered into, on her arrival at New York, by which the underwritten was empowered "to take charge of the said vessel, and dispose of her to the best advantage, without prejudice to his claim or abandonment." Under this authority he sold her at public auction, and shortly after commenced an action against the plaintiffs, in which, as the abandonment was proved duly made, a recovery was had for a total loss, amounting to 872 dollars and 35 cents, after giving them credit for the proportion of the proceeds to which they were entitled. The costs of the assured's attorney were taxed in that action at

upon the party, it should be affirmatively shown that the jury could not legally have allowed the defence. *Id.*

A defendant in this court against whom a judgment is rendered will not, on motion, be allowed to set off a justice's judgment held by him as assignee where the facts as to the rights of the parties are complicated and intricate. It seems that unless a plain, undisputed matter of set-off is presented by a party thus standing in the character of an assignee of a justice's judgment, the motion will be denied. *Story v. Patten*, 3 Wen. 331.

A judgment when set-off and allowed, is extinguished. *Schroepf v. Jewell*, 1 Cow. 208.

A judgment for costs only will be set off against another judgment, on motion, notwithstanding the attorney's lien, although the judgment be assigned to him by his client as security for his costs, of which notice is given to the opposite party, with direction not to arrange the costs with the client; especially where the attorney has notice of the matter of set-off; and that it will be claimed. *Cooper v. Bigelow*, 1 Cow. 206.

An attorney obtains a judgment for costs in favor of A. against B.; the latter has no right to set off a judgment purchased by him against A. after the judgment obtained in A.'s favor, so as to defeat the attorney's lien. *Bradt v. Koon*, 4 Cow. 416.

The court will protect the attorney's lien to the same extent as the rights of an assignee. *Id.*

In an action on a judgment, in the name of a judgment creditor, for the benefit of an assignee of the judgment, the defendant cannot set off a debt due to him from the assignee. *Wheeler v. Raymond*, 5 Cow. 231; S. C., 9 Cow. 295.

Where W. assigned a judgment to L. and K. who gave notice to the debtor, and then assigned to K., who assigned to another, notice of the two last assignments not being given to the debtor; in debt on this judgment by the last assignee, in the name of W.; held, that the debtor could not set off a demand due to him from R., while the latter owned the judgment. *Id.*

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by these that the reassurer undertakes, and the hazards of the first contract are the foundation of the second. 1 Emer. 248. It is on this principle, that there is no connection between the reassurer and the primitive assured, or his property. Marsh. 112. Park, 276. If an assurer fail, the assured has no *lien* on the reinsurance, in preference to other creditors. 1 Emer. 248. The only reason why an abandonment has ever been required, is, that on a technical total loss, the subject matter is transferred by a demand on the underwriter, who then becomes a vendee, as it were, of the property, and liable for the consideration. On payment of the loss, he is an absolute purchaser. This reasoning can never apply to a reinsurance. To abandon property, the assured must have some in himself. The assurer has none; it is impossible, then, that he can abandon. To enable him to do it, he must first accept; and the result would be, that wherever a reinsurance was effected, there would be no defence on a claim for a technical total loss. For, to entitle the assurer to recover, he would be obliged to abandon; and as he could not abandon property which he had not, without first accepting, he would accept in order to be able to recover. The only thing necessary to prove on a reinsurance on a ship is the value, and that the plaintiff did insure. In a reinsurance on goods, the shipping of them is also required. 1 Emer. 336. Pothier, n. 153. In the case before the court, the defendants have the full benefit of an abandonment. The value of the property is carried to their credit. If we are right on the first point, the next inquiry is, what ought we to recover? The whole of what has been paid. Roccus, note 12, says, "*iste secundus assecurator tenetur ad solvendum omne totum quod primus assecurator solverit.*" That this will exceed the amount insured is no objection. Under the clause authorizing the plaintiffs to "work, labor," &c., on account of the defendant, every thing *bona* [*193] *fide* expended *is to be recovered, though it surpass the sum in the policy. *Smith v. Scott*, April,

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1795, confirmed by *Lawrence & Whitney v. Van Horne & Clarkson*, 1 Caines' Rep. 284. Whether the conduct of the plaintiffs was *bona fide* or not, the case will show ; and, indeed, as the written abandonment was only in consequence of the defendants' seeming to think one necessary, it is possible a good and legal, though a verbal one, might have been previously made. The general principle in contracts of indemnity is, that all costs incurred shall be paid. *Mayor v. Steward*, 4 Burr. 2439. *Goddard v. Vanderheyden*, 3 Wils. 262.

Evertson, contra. The assurer, and reassurer stand in precisely the same situation with respect to each other, as the assured and his assurer ; whatever, then, is necessary to entitle to a recovery in one case is also in the other. It is more peculiarly requisite on a reinsurance than on an original policy. Because the reassurer is liable over ; and in all cases of ulterior responsibility, notice is indispensable. The reason is obvious ; that he may either aid in the defence, or, by satisfying the demand, avoid an increase of expense. This privilege has been taken from the defendants, and as they stand in the light of sureties, the court will, in favor of them, lay hold of every act and omission of their principals, by which they may be injured. *Law v. The East India Company*, 4 Ves. jun. 833. Considering the plaintiffs as our agents, it was their duty to have given us every information that might lessen our loss. Not having done so, they have no right to look for indemnity. The cases cited as to costs do not apply. They relate to persons claiming from another, on account of an injury sustained by this act. But there is an authority in point to show no costs of the suit against the plaintiffs ought to be allowed. *Seller v. Work*, 1 Marsh. 207. An insurance broker had omitted to communicate part of the information contained in his order to insure, and in an action against him, the plaintiff wished to include the costs of a non-suit against the underwriter, but Lord Eldon ruled

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they could not be recovered, as there was no necessity for bringing the action. So here, had the abandonment been made to us, a suit on the original policy might have been avoided.

[*194] **Harrison*, in reply. To warrant a recovery on a reassurance, the same measures cannot be required from the assurer, as, on an original policy, would be demanded of the assured. He must prove interest and loss before he can claim. This cannot be asked of the insurer who has no interest. Wherever, therefore, the contracts vary in their natures, the procedures differ also. In the case from *Marshall*, the plaintiff in both suits was the same person. He was not defendant in one, and plaintiff in the other, and therefore the reasoning of it is totally inapplicable.

KENT, Ch. J., delivered the opinion of the court. Upon the first and most material question in this case, very little information can be found in the English books, as reassurances are rendered unlawful in most cases, by the statute of of the 19 Geo. II. But reassurances are valid and usual contracts in France; and, from the general principles applied to them by the French writers, it appears that the contract of reinsurance is totally distinct from, and unconnected with the primitive insurance, and that the reassurer has nothing to contest or settle with the primitive assured. The insurer, therefore, who makes reinsurance for his own indemnity, is obliged to prove the loading and value of the goods in the same manner as if he was the original insured. It is, however, usual for the policy of reinsurance to contain an express provision that the reassured shall only be obliged to produce the evidence of payment of the loss, and the reassurer will be bound to refund it. This special contract obliges the reassured to act with good faith, but leaves him in all other respects to his own discretion and prudence, in admitting or contesting the claim of the first insured. Pothier, n. 153. 1 Emer. 247, 248, 250, 252, 238,

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840. But when no such special contract is made, and none was made in the present case, the reassurer will be obliged to pay all that the first insurer ought himself to pay; and this will impose upon the first insurer the burden of proving the existence and extent of the loss.(a) When he has done that, he has done all that was requisite to entitle him to his indemnity. The notion that he must give notice, or abandon to the reinsurer, as soon as the first insured has abandoned, does not appear to be well founded. There is no such rule *that appears to be pre- [*195] scribed in any of the books, and it does not necessarily arise out of the nature of the contract. The reinsurer has no connection or concern with the first insurance, and is, at all times, bound to indemnify his own insured, when the other can show that he has been damnified in consequence of the first insurance. The reinsured must take care, at his peril, that the claim against him be well supported before he admits and satisfies it: for the reinsured will be entitled to avail himself of every defence that the first insurer might have urged. This is a fundamental principle in the law of securities. And if the reinsured proves the original claim against him to have been valid, when he resorts over to the reinsurer, he then makes out a fair case for indemnity, and such a case is made out in the present instance. Warren abandoned the vessel during a total loss, and the plaintiffs were inevitably fixed with the payment of that loss.

The next question is, whether the defendants are bound to pay the costs that the plaintiffs were put to in defending the suit brought against them by Warren? We are of opinion that they are.(b) On the day that the suit was

(a) Note this great difference between re-assurers and sureties; for a surety, after a demand on his principal and refusal, is immediately liable to the person guarantied, without any suit against the original debtor, unless by the words of the contract it be necessary. *Bank of New York v. J. R. Livingston*, October term, 1801, MS. Kent, Ch. J.

(b) A sheriff in an action on a bond for the liberties, is entitled to reco-

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brought against the plaintiffs, they gave notice of it to the defendants, and the latter might have come forward, and prevented the suit, by payment of the sum demanded. As the plaintiffs were bound to know at their peril that the claim against them was valid, and gave notice to the defendants as soon as the legal demand was made, they were justified in submitting the claim to the decision of a court of justice, and the costs which necessarily arose in that suit might be considered as incurred upon reasonable grounds, and for the greater caution and safety. From the cases of *Goddard v. Vanderheyden*, 2 Black. Rep. 794., and *Mayor v. Steward*, 4 Burr. 2439, it would seem that such charges are allowed, as composing part of a claim for indemnity; and as interest upon all sums advanced follows of course, we are of opinion the verdict as taken ought to stand.

LIVINGSTON, J. This is a case of reinsurance. These contracts being prohibited in England, unless where the first insurer becomes insolvent or dies, we cannot thence expect any aid in construing policies of this kind. A recovery is here resisted because no abandonment [*196] was made *to the last insurer. From the nature of the contract, I think none was necessary. We must not confound a reinsurance with the original policy, nor consider a party to the former as in the shoes of the first underwriter. This engagement is to make good all that the first underwriter shall lose or become liable to pay. "*Secundus assecurator*," says Roccus, "*tenetur ad solvendum omne totum, quod primus assecurator solverit*." The original insurer, then, notwithstanding his precaution in obtaining this indemnity, has a right to defend himself in any way he thinks proper against the party with whom he contracted, between whom and the reinsurer there is no privity

ver the amount of debt and costs in the original suit, and the costs of defending himself in that for the escape, if any be brought. *Kipp v. Brigham*, 7 Johns. Rep. 168, and in *Staats v. Ten Eyck*, ante, 118, n.(a) as to the measure of damages on a recovery over.

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at all. He is not bound even to consult the latter, which, however, he will hardly fail to do, when in his power, and which, I have no doubt, was done here. He is not obliged to accept of an abandonment, and then, as was the case here, he can have nothing to abandon. In short, he may controvert the plaintiff's right to recover, or pay without suit, as he shall think proper; only taking care to act with integrity and good faith. If he settles without suit, probably he would be obliged, as against his insurer, to show that the loss was justly due.^(a) If doubtful of the solvency of the party to whom he must look, he may be desirous of reducing the loss as much as possible; or he may apprehend a bankruptcy not very distant, which may make it his interest, if satisfied that the loss be fair, to pay it immediately, so as not to be delayed in his recourse against the underwriter. It would be to the disadvantage also of a reassurer, to compel his assured, in all cases, to accept of an abandonment which would be necessary, if he himself be entitled to one. This species of contract, although not allowed in England, is permitted by most of the commercial states of Europe, and when confined to its proper object, is reasonable and beneficial. We should not, therefore, impose on the assured, in such a policy, a line of conduct unnecessarily strict or difficult to pursue. I prefer, therefore, leaving him as much at liberty as if he had no ulterior responsibility in view, without compelling him to act in conjunction with, or under the control and advice of, the second underwriter; not permitting him, however, which must be a matter of course, to throw on the latter the expense of defending a suit brought by the *original insured, if he will, on notice of such ac- [*197] tion, which ought to be given as early as possible, pay, or tender, the sum demanded by him. On the very day Warren commences his action, the plaintiffs give notice

(a) Would it not rather be a matter of defence to show that it was not justly due?

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of it to the defendants, who take no one step to prevent its progress to final judgment. All the costs, therefore, of that suit, both plaintiffs' and defendants', are a proper charge in this, especially as it is not pretended that its defence was unnecessary or improper. The defendants' counsel having conceded that interest is a proper charge, if their clients be liable for the principal sum, I am for the plaintiffs on all the points made, and they must have judgment accordingly.

Judgment for the full amount of the verdict.[1]

[1] Goods were insured from New York to Tonnigen, and the insurance was expressed to be on coffee, valued at twenty-five cents per pound, and there was the usual clause as to prior insurance. A prior open policy of insurance had been effected in London, on the cargo of the same ship, generally, consisting of coffee, pepper, sugar, and wood; the vessel was lost, with her cargo, a small part only being saved. In an action on the second policy, held that part of the cargo being pepper, &c., not insured by the second policy, estimated at the first cost, without deducting the drawback, was to be deducted from the sum insured on the first policy, including the premium; and the residue was to be applied to the coffee, at its prime cost and charges, including the drawback; and the coffee remaining uncovered by the first policy, estimated at twenty-five cents per pound, and adding the difference between the first cost and the valuation, on the quantity covered by the first policy, together with the premium of insurance on the second policy, constituted the amount of interest to be covered by the second policy. *Minturn v. Col. Ins. Co.*, 10 J. R. 75.

Insurance was made to the amount of \$15,000 on goat skins, valued at fifty cents; and the policy contained the usual clause as to prior insurance. A prior insurance had been made by an open policy on the cargo, on board of the same ship, for the same plaintiffs, to the amount of \$22,000, and the prime costs of the skins was twenty-two cents each. Estimating the skins at fifty cents each, and the rest of the cargo at the invoice prices and deducting the prime costs of the skins, the amount was sufficient for both policies; but the cargo, exclusive of the skins, was not sufficient to absorb the prior insurance. In an action on the second policy, held, that the whole of the goat skins were to be valued at fifty cents; and after deducting from this amount the difference between the invoice price of the cargo, charges, &c., exclusive of the goat skins, and the \$22,000, or the amount of the prior insurance, the residue would be the interest covered by the second policy; that it was immaterial whether the first policy was open or valued, if the skins, at fifty cents each, would furnish interest sufficient for both policies. *Kans v. Com. Ins. Co.*, 8 J. R. 229.

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Where a vessel was valued at \$2000, and insured for that sum, and there was a prior insurance for \$3000, the insured was allowed to prove that the vessel was worth enough to cover both policies. *Kenny v. Clarkson*, 1 J. R. 386.

Lord Mansfield says, double insurance is "when the same man is to recover two sums instead of one, or the same sum twice over, for the same loss, by reason of his having made two insurances on the same goods, on the same ship." *Col. Ins. Co. v. Lynch*, 11 J. R. 233.

His lordship could never have intended that two insurances on the same ship not for the same entire risk, was a double insurance. *Id.*

The plaintiffs, by an open policy of insurance, on the 5th October, 1811, insured for the defendant the sum of \$20,000 on goods laden or to be laden on board the American ship *Ann*, for a voyage, "at and from Bayonne, to the first port she might make in the United States." The premium was fifty per cent., and the policy contained the following written clause relative to prior insurance: "Provided always, and it is hereby further agreed, that if the said assured shall have made any other insurance on the premises aforesaid, prior in date to this policy, then the said Columbian Insurance Company shall be answerable only for so much as the amount of such prior insurance may be deficient toward fully covering the premises hereby insured; and the said Columbian Insurance Company shall return the premium upon so much of the sum by them insured as they shall be by such prior insurance exonerated from. And in case of any insurance upon the said premises subsequent in date to this policy, the said Columbian Insurance Company shall, nevertheless, be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers; and shall, accordingly, be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made." In September, 1811, goods, consisting of wine, brandy, and seventeen bales of furniture, were shipped on board the *Ann*, at Bordeaux, for the account and risk of the defendant, the invoice price of which, deducting an interest of Lewis Barry, was \$9512. The ship arrived in safety at New York on the 15th December, 1811, with the wine, brandy, and furniture, which were duly delivered to the defendant. One case of the furniture, which had been damaged on the voyage, was surveyed by the wardens of the port, and sold at auction, the nett proceeds of which was four hundred and sixty-eight dollars and five cents. The invoice cost of the case of furniture was, one thousand and ninety-four dollars, but with premium and charges, amounted to two thousand one hundred and seventy-three dollars and forty-six cents. *Id.*

It was held, that the risk on the second policy was not divisible, and that the insured were not entitled to a return of the premium from the underwriters at New York, on the amount covered by the prior insurance in Philadelphia. *Id.*

The assured is not entitled to two satisfactions. Thus, upon a double insurance, although he may sue the underwriters on both policies, he can re-

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cover only the real amount of his loss, to which all the underwriters shall contribute in proportion to their several subscriptions. *Lucas v. Jeff. Ins. Co.*, 6 Cow. 635.

In the first action he may recover the whole sum insured, leaving the defendant to recover a rateable satisfaction from the other insurers. *Id.*

The two policies in such case make but one insurance. *Id.*

In case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to demand or recover on this policy, any greater portion of the loss or damage sustained, than the amount insured shall bear to the whole amount insured on the said property. Settled construction of this clause. *Id.*

Where there are several policies containing this clause, they are all and each liable to pay the rateable portion mentioned in the clause, though it happen that some paid more than their share; and even enough to cover the whole loss, and this, whether they had knowledge of all the policies at the time or not. *Id.*

There is no contribution between policies containing this clause. *Id.*

Where, however, there are several policies, and only one contains this clause, and the others pay to the extent of their subscriptions, which is more than their rateable share, this will be a defence, *pro tanto*, in an action against the underwriters on the policy containing that clause; and if the policies without the clause have paid enough to cover the loss, it is a complete defence for the others; for they are liable to contribute to the underwriters who have paid. *Id.*

And so where all the policies are without this clause. *Id.*

If underwriters, sued on a policy containing this clause, seek to defend themselves on the ground that other policies, without it, have paid the whole loss, or more than their rateable share; it lies with them to show affirmatively the other policies without the clause. This is matter of defence; and the absence of the clause in the other policies will not be intended. *Id.*

Where there are several policies on the same subject, without this clause, it is double insurance; they are all deemed but one policy; the insured can recover but one indemnity; and contribution prevails between the insurers. *Id.* 3 N. Y. Dig., p. 175, *et seq.*

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JACKSON, *ex. dem.* FROST, *against* HORTON.

If an action be instituted under the statute of the 28th of March, 1797, within the five years thereby limited, and it abate by the death of the defendant, who dies after the five years have expired, whether another action, though instituted directly after, can be maintained? *Quære.*

EJECTMENT for lands in the county of West-Chester: The declaration served, was captioned of August term, 1803, and the consent rule entered of the November term following. At the trial the defendant insisted that the plaintiff was barred from maintaining the action, by virtue of the provisions of the law of the 28th of March, 1797, (1 Rev. Laws, 162,) limiting to five years the period for bringing claims and prosecutions against forfeited estates. To do away with the force of this objection, the plaintiff proved a suit by the present lessor, instituted on the 10th of June, 1801, against Abijah Whitney, then tenant in possession; which action was afterwards defended by Henry Strong, as landlord, who died pending the same, and before there was an opportunity of bringing it to trial. That immediately afterwards, another suit was commenced against Whitney, who still continued in possession, but before the cause could be heard, he also died, and that as soon as his death was known, the present ejectment was brought.

The case now came before the court on this single point: whether the above circumstances were sufficient to prevent the operation of the act?

Woods, for the defendant. The intention of the legislature was to quiet all claims on forfeited property. The only exceptions allowed by the statute are, infancy, coverture, and insanity. Death of a defendant is not mentioned, and, *therefore, cannot be urged. I [*198] know not of any decision exactly in point, but the principle of *Lloyd v. Vaughan*, 2 Stra. 1257, seems

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analogous to the present case. There, on error to reverse a recovery, because the tenant in tail, who was vouched as a *feme sole*, was under coverture, the defendant pleaded in bar the 10 W. III. c. 14, limiting to twenty years the period for bringing writs of error to reverse common recoveries. The plaintiff replied that his title did not accrue till the death of tenant in tail, yet, because more than 20 years had elapsed from the suffering the recovery, and the act was for quieting estates, without any saving as to the time when the title accrued, the court, on demurrer, gave judgment for the defendant. So, in *Prideaux v. Webber*, (1 Lev. 81,) that the courts were not open during a rebellion, was held no bar to the statute of limitations, because not within any of the savings. The institution of a former action in time, will not make the present action in season. *Wilcocks v. Huggins*, (2 Stra. 907.) To avail of former proceedings in saying a limitation, they must be continued.

Riggs, contra. Courts, in construing statutes of limitation, have never confined themselves to the very letter, but have, in many cases, adopted an equitable interpretation, according to the spirit of the clause, by which a year is given after reversal on error, or arrest of judgment, to commence a new suit, though the period limited has elapsed. Thus, with respect to executors, if, in *assumpsit*, they sue out process within a year after the six years have expired, the action is held to have been brought in time. This principle is acknowledged in the very authority of *Wilcocks v. Huggins*, cited from *Strange*. In *Story v. Atkins*, 2 Stra. 719, levying a plaint in an inferior court was held a good replication to a plea of the statute of limitations in a superior. So here, as the first action was brought in time, the present ought to be held a continuance of the first suit. To do it by *journeys accompts* was forbidden by the nature of the action; as it is commenced without process. A new suit was, therefore, the only mode; and in ejectment, which is an action peculiarly under the equitable control of the court, the equity adopted in construing other cases under

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the statute of limitations ought to govern. It is inferable from the words in the act, which *direct [*199] only the suit to be prosecuted within the five years, but do not say with effect. The plaintiff did prosecute his claim within the period, and surely it is not to be prejudiced by the death of the defendants, which was the act of God. Rather than suffer a clear title to be thus defeated, the court would give leave to enter in the original suit judgment against the casual ejector, *nunc pro tunc*:

Woodworth, (Attorney-General,) in reply. The court are bound by the express terms of the statute. The equitable interpretation insisted on, arises out of the words of the "act for the limitation of criminal proceedings and of actions at law," (1 Rev. Laws, 562.) There are no such expressions in that relied on by the defendant. The reason which induced the legislature to pass the act, prohibits the construction urged on the court. It was to quiet and extinguish claims on forfeited estates; it is against the policy of the law, which was not enacted till 13 years after the state confiscated the property of its enemies, to protract the time before it can take effect. Three cases only were excepted from its operation; the court cannot make a fourth. The intent of the law was, in all cases not saved, to inhibit the bringing an action after five years, and as the interests of the people are implicated, a longer time cannot be allowed.

SPENCER, J. Upon the state of facts in this case, two questions arise: 1st. What is the effect of the statute of the 26th of March, 1797, on suits instituted after the expiration of five years from its enactment? 2d. Will the peculiar circumstances of this case exempt it from the operation of that act?

The first section of the statute(a) enacts, that no persons

(a) Act limiting the period of bringing claims and prosecutions against forfeited estates.

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who have, or thereafter shall have, any estate to any lands, supposed to be forfeited to the people of the state, by the attainder or conviction of any person, for any act or crime done during the late war, and which had been theretofore granted or conveyed by the commissioners of forfeitures, shall, after the expiration of five years from the passing the act, have, prosecute, sue, or maintain, any action or suit at law for the recovery thereof, against the right or title so granted or conveyed by the people of this state.

The second section of the statute enacts, that if any persons shall, and do, at any time after the period of [*200] five *years, sue, or prosecute any suit or action at law, or make any title, or claim, in, or to any of the lands granted, as aforesaid, that then such person, so suing or prosecuting such action, shall henceforth be utterly barred for ever of all and every such suit or action.

The third section protects the rights of infants, *feme covert*s, and insane persons, allowing them the period of five years after their disabilities are removed, to bring, sue, and prosecute their suits or actions.

There is a material difference in the phraseology of this act and the common statute of limitations. The latter requires the suits to be commenced within the periods designated; the present not only requires the suits to be brought within five years from the passing the act, but declares that no person, after that period, shall have, prosecute, sue, or maintain, any action or suit at law for the recovery of lands sold by the commissioners of forfeitures.

The reasons for an act savoring of such rigor, are explained in the preamble to it. The title deeds and documents relative to forfeited estates, had been carried away by the former proprietors, whose conduct caused their forfeiture, and the title of the state resulting therefrom became peculiarly liable to be obscured or defeated. From the expressions used in the first and second sections of this statute, it appears to me that the sense of the legislature is plainly manifested to be, that, except as to titles accruing after the

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passing the act, and the case of infants, *feme covert*s, and insane persons, they meant to inhibit the maintaining any suit, without reference to the period of its commencement, after the expiration of five years from the passing the act. I do not feel myself at liberty to nullify an act of the legislature, in the face of expressions so conclusive.

If, however, the law should be construed to relate only to the commencement, and not the maintenance of suits, the objection is conclusive that these actions were brought too late.

Courts have allowed a year to commence a new action in case of executors, if the limitation had not attached on the death of the testator; but this was done as being within the equity of the proviso in the statute, giving the plaintiff a year to commence a new action, where the judgment **is* arrested or reversed. The present [*201] statute has no such proviso as is contained in the statute of James, or our statute of limitations; there is, therefore, no ground on which to raise an equitable construction, so as to embrace the case of the lessor of the plaintiff. It has been justly remarked by his counsel that his case is a hard one, as he had commenced two ejectments within the period required, both of which were defeated by the death of the defendants. Suggestions of this kind cannot alter the language of the law. In the cases of *Prideaux v. Webber*, 1 Lev. 31, and *Little v. Vaughan*, 2 Stra. 1257, the statute of limitation was pleaded, to which it was replied, that certain rebels had usurped the government, and none of the king's courts were opened, yet the whole bench gave judgment in favor of the defendant, that the statute of limitations was a good bar, "although the courts were not open, because there is not any exception in the act of such a case, and infants had been bound thereby, if they had not been excepted." It is only necessary to add, that in my opinion, without to repeal the statute, the plaintiff cannot recover.

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LIVINGSTON, J. As the first action, which was commenced in time, was not prosecuted to effect, by reason of the defendant's death, but was renewed a second and third time on the same account, I inclined to think, on the trial, that the plaintiff was not barred. It has been my wish ever since, to adhere to this opinion; but with every leaning towards the plaintiff, who has a good title to the premises, I am compelled to abandon it. His situation is a very hard one, but the hardship is not of our creating. The legislature has thought proper to force those who claim title to forfeited estates to bring their actions within a certain period, and although it may not have been intended to take advantage of the act of God, its language is sufficiently strong to preclude our interference, whatever injustice may be produced. After prescribing a term, it is declared, that "if any person shall thereafter sue, he shall be utterly and forever barred from a recovery;" if, then, this suit were not commenced within the period defined,

what power or right have we to relieve the party,
 [*202] or *take his case out of the plain letter of the law?

Courts, it is true, have considered cases which would have been barred by the letter as within the equity of certain provisions of the statute of limitations; thus, if a first judgment be arrested or reversed, a year is allowed to bring a new action, and so *toties quoties*; and the equity of the proviso has been extended to an executor, who sued out process within a year after his testator's death, if six years had not elapsed when he died; but here is no proviso, within the equity of which this case can be brought. Infancy, coverture, and insanity, are alone saved. No other impediment or contingency is provided for. Neither of these disabilities, nor any resembling either of them, existed here; so that we cannot, without legislating, help the plaintiff. It is certainly much better to permit a statute, now and then, to work individual hardship, however great, than by too liberal an application of what may be supposed rules of equity, to render its pro-

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visions uncertain or nugatory. By too great indulgence of construction, the statute of limitations, passed for the most salutary purposes, is become, in a great measure, inoperative, if not a dead letter. A person can hardly open his mouth, even to deny an old debt, without exposing himself to an action for it; although the remedy had been barred for many years. Cowp. 543. If its object were to prevent controversies about stale demands, courts have been ingenious to defeat it, by permitting the loosest expressions to ensnare the unwary, and prevent its attaching, notwithstanding the most positive declaration, that an action shall be commenced within a certain time subsequent to its accruing, and not after. Although I shall always feel bound by these decisions, in cases where they apply, I am not desirous of extending them, and therefore do not think myself at liberty to depart from the very imperative tone of the law now under consideration. Without repealing it, or making a new law, this suit cannot be maintained. *Ita lex scripta est* will be a sufficient answer to any complaint of hardship or inconvenience.

"When the words of an act are doubtful and uncertain," says the great and learned Lord Chief Justice Willes, * "it is proper to inquire what was the in- [*203] tent of the legislature, but it is very dangerous for judges to launch too far in searching into the intent of the legislature, when they have expressed themselves in clear words. In the present case, the terms are too explicit to leave room for interpretation, or the smallest obscurity on the meaning of the legislature. My opinion, therefore, is, that judgment of non-suit be entered.

TROMPSON J. The only question submitted to the consideration of this court is, whether the plaintiff be not barred from maintaining his action by reason of the act of the 28th of March, 1797?

This statute requires suits, in cases like the present, to be brought within five years from the passing of the law.

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A suit for the recovery of the premises in question was commenced within the time limited, and abated by the death of the then defendant. Another action was forthwith commenced, but not until after the time limited, which also abated by the death of the then defendant. The present suit was thereupon immediately brought. These facts, thus concisely stated, are those which will, I think, take the case out of the letter of the statute. No *laches* is attributable to the plaintiff. He commenced his first suit in due season, and the whole delay has been occasioned by the death of the parties. I think the case comes strictly within the maxim, that the act of God shall prejudice no man. *Shelly's Case*, 1 Rep. 97, *b*. It would be highly unreasonable that those things which are inevitable by the act of God, which no human vigilance or industry can avoid or prevent, should be construed to the prejudice of any person in whom there was no *laches*.

Thus in the case of the statute of limitations, pleaded to actions by executors on simple contract debts, it has been decided that if the six years be not elapsed at the time of the testator's death, it will save the bar by reason of the limitation, if the executor take out proper process within a year, although the six years be elapsed before process sued out.

This, however, is said to be within the equity of the statute, which gives a year to commence a new action, [*204] in *case the first judgment has been arrested or reversed. Bull. N. P. 150. I am not able to discover the application of the reason to the rule.

The object of the statute was to make provision where delay had been occasioned by the acts of the law, and is confined to the two cases where judgment had been reversed or arrested. The proviso has no reference whatever to cases where the delay has been occasioned by death. The reason assigned will, at all events, show that courts will go great lengths to prevent the application of the statute of limitations. But the exceptions out of it have been

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carried still further. It has been ruled, that where an executor brings *assumpsit*, but dies before judgment, and the six years run, his executor may, notwithstanding, bring a fresh action, if he brings it in a reasonable time, which is to be left to the discretion of the court, upon the circumstances of the case.

This principle is strongly fortified by the case of *Wilcocks v. Huggins*, (Fitz. 81, 170, 289, 2 Stra. 907, Esp. Dig. 150,) where the court would not sustain the action against the plea of the statute of limitations, by reason of the delay, there having been a lapse of four years between the death of the first executor and the commencement of the then suit. But they say if the second executor had been retarded by suits about the will or administration, and he had shown that in pleading, it would have been otherwise; because, then the neglect would have been accounted for.

If circumstances like these would prevent the statute of limitations from running against a claim, *a fortiori*, ought the death of a party? It is said, however, the statute is positive, and contains no provisions for cases like the present. It is true there is no express provision; but I consider the case as coming within the spirit of the act. The object of the legislature was to expedite the prosecution of claims against lands that had been considered as forfeited; and although the present action cannot, technically speaking, be called the same as the one first commenced, yet it is the same claim, followed up with all the despatch in the power of the lessor of the plaintiff. The legislature could not have contemplated the application of the statute to a case like the one before us. Delay occasioned *by the act of God forms an exception, [*205] *ex necessitate rei*, without any express provision. I am, therefore, of opinion, that the plaintiff is entitled to judgment.

KENT, Ch. J. The statute of limitations which is set up

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by the defendant, was passed the 28th of March, 1797, and declares that no person having any right to lands, supposed to have been forfeited, and heretofore conveyed by the commissioners of forfeitures, shall, after five years, have any suit for the recovery thereof, against the title conveyed by the people, with a saving, nevertheless, of the rights of infants, *feme covert*s, and persons insane.

The present case is not within any of the exceptions of the act; but is, at least, within the equity of those exceptions. The statutes of limitations were formerly construed with extraordinary rigor against the plaintiff, as in the cases of *Prideaux v. Webber*, (1 Lev. 31, and 1 Keb. 157,) and of *Bremion v. Evelin*, (1 Lev. 111,) in which the replications, stating that the king's courts were shut during the rebellion, were held to contain no excuse, because not a case within the exceptions of the statute. A different and more reasonable construction prevailed, however, in this court, in the case of *Sleight, Administrator, &c. v. Kane*, decided in April term, 1799. That suit was on a promissory note, dated in 1777. The defendant pleaded the statute of limitations. The plaintiff replied that the defendant was within the British lines, in the southern district of this state, under the power and protection of the British, from 1777 to the 24th of November, 1783, when he departed this state, and that the suit was brought within six years after his return. The defendant rejoined that he did not join the British till after the cause of action arose; and on demurrer, the court ruled, that being within the British lines, which were held by right of conquest, was being out of the state, as it respected the statute of limitations, and gave judgment accordingly for the plaintiff. This decision was a liberal construction, if not extension, of the exception in the statute. But whenever the plaintiff has brought his suit in season, and that suit has failed, in consequence of the act of the defendant, or of the act of God, and a new suit has been commenced with due diligence, although after the [206] limitation had expired, the *defendant seems

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never to have been allowed to avail himself of the statute in bar of the new suit. Thus, in the case of *Mathews v. Phillips*, (2 Salk. 425,) the plaintiff brought his suit in an inferior court; while it was pending there, the six years expired, and the defendant removed the cause by *habeas corpus* into the king's bench, where the plaintiff was obliged to declare *de novo*, and the defendant pleaded the statute of limitations; the court held that the plaintiff might reply the suit below, not for the reason that the suit above was a continuation of it, but because the plaintiff had rightfully and legally pursued his right, and it should not be in the power of the defendant to defeat him of a remedy without any default. It has also been repeatedly held, that where the creditor brought his action before the expiration of six years, and died pending the suit, but after the six years had expired, the executor had one year, at least, after the death of the testator, to renew the suit; and if the new suit had been retarded, by the contests about the will or administration, then a longer time would be allowed, as this would be accounting for the neglect. Salk. *ubi sup.*, and 2 Stra. 907. The analogy is so complete between the case of a suit within the time of limitation being defeated by the death of the plaintiff, and by the death of the defendant, as that the same rule ought to apply in both instances. The delay arises from the act of God; it would, therefore, be unjust, and against the general maxim of law, to make that event work to defeat the party of his remedy. The judges, says Plowden, p. 205, "have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, according to that which is consonant to reason and good discretion." Following the rules of sound and established interpretation, it is difficult to suppose the legislature intended to save the party's right, in cases of marriage and infancy, and not also in such as the present, where the death of the possessor defeats it. We are rather to conclude that they considered the present case as already provided for, by rules and de-

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cisions long established and universally approved. There is the greater reason why the present case should [*207] be brought within the *equity of the exceptions to the statute, because the act prescribed a new, special, and rigorous rule against particular claims. It is, therefore, not founded on general and equal principles; and, moreover, it took away from the party a right with which he was antecedently vested,—the right to bring his suit within 20 years. The conduct of the lessor of the plaintiff, in bringing his first suit within the new limitation of five years, and in reviving it with all possible diligence as often as it was abated, by the death of the defendant, is analogous to that of the disseisee, whomade continual claim, which was admitted, by the common law, to save the right of entry from being tolled by descent.

But if the statute is absolutely binding in every case not expressly mentioned, yet the plaintiff is entitled to relief in another way. When Strong, the landlord, was made defendant to the first suit, he was not joined with the tenant, who must have refused or neglected to appear, and by the statute 1 Rev. Laws, 146, judgment ought to have been entered against the casual ejector, and when the landlord was admitted in his stead, the rule prescribed by the act is, that execution upon the judgment against the casual ejector stay until further order. Why this judgment was not entered does not appear; but, as it ought to have been done, and as the plaintiff is now to lose his right forever, by reason of that omission, I think we ought to do here as is the common practice in a thousand other instances; grant a rule that judgment be entered against the casual ejector, *nunc pro tunc*, and that the plaintiff be at liberty to proceed upon that judgment.

TOMPKINS, J., gave no opinion, having been concerned.

* * The bench being thus divided, the parties, by advice of the court, agreed to turn the facts into a special verdict, and carry the case to the court of errors.

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FERRIS against COLES.

Under the "act for the inspection of flour and meal," on such only as is purchased, manufactured or shipped for exportation do the penalties attach, and if an inspector, without being requested, inspect, against the will of the proprietor, though every cask be deficient in weight, and falsely tared, debt will not lie for the penalties, unless it appear the flour or meal was for exportation.

DEBT, by the inspector of New York, for two penalties under the act for the "inspection of flour and meal," (1 Rev. Laws, 424,) subject to the opinion of the court, whether he was entitled to recover both, one, or neither.

*The declaration stated, that "Edward Ferris, [*208] who sues in this behalf as well for the poor of the city of New York as for himself, complains of John B. Coles," &c., "that he render to the said poor, and to the said Edward, who sues as aforesaid, five hundred and thirty-seven dollars and sixty cents, which he owes to, and unjustly detains from them. For that, whereas," by the act it was enacted, that all wheat flour "manufactured for exportation," should be packed in casks of a certain length, containing a certain number of pounds, "the tare of each cask to be respectively marked on one head with a marking iron," the net weight only of each cask "packed as aforesaid," to be branded on it, and that the manufacturer or owner of any flour put up in casks, should "be subject to a penalty of 50 cents for every pound such cask was tared less than the true weight thereof, and any inspector of flour or meal, having reason to suspect such cask or casks to be falsely tared, might ascertain the same by a suitable examination thereof," and further, "that it should be the duty" of the inspectors, "upon application to them made, to examine and determine the quality of such flour," and "from time to time weigh such casks of flour as they should suspect of being too light; and if found not to contain the just and true weight, to mark or brand the same

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on the head with the word light, and for each cask which they should so mark or brand, they should be entitled to receive from the owner, for their trouble of weighing the same, the sum of twenty cents, for every barrel," and the manufacturer of such flour to "forfeit and pay for every pound weight of flour deficient, the sum of twenty cents," the same "to be recoverable before any justice of the peace, or in any court of record in this state having cognizance thereof, by any person who would prosecute for the same, one half to the prosecutor, and the other half to be paid to the overseers of the poor of the city or town "where the fraud was detected;" the declaration then set forth, that the defendant, after the passing of the act, to wit, on, &c. was "the owner of 384 half barrels of flour tared two pounds each less than the true weight thereof, by reason [*209] whereof, and by *force of the said act of the legislature of the state of New-York, an action hath accrued to the said Edward, who sues in this behalf as well for the poor of the said city of New-York as for himself, to have and demand of the said John the sum of 384 dollars, parcel of the said 537 dollars and 60 cents, to wit, the sum of 50 cents for every pound each of such casks was tared less than the true weight," and also, "that the said John was the manufacturer of 384 half barrels of flour, which contained two pounds each less than the weight branded thereon, by reason, &c., an action had accrued," &c., "to have and demand of the said John the sum of 153 dollars and 60 cents, (residue, &c.,) being the sum of 20 cents for every pound weight so deficient," yet, &c., "to the damage of the said Edward of 537 dollars and 60 cents. Plea, the general issue, and joinder.

It was admitted that the plaintiff was required by the defendant to inspect 72 half barrels of flour, which proved to be not only falsely tared, but deficient in quantity, and that the penalties thereby incurred were duly paid. That at this time the defendant had in his store 384 half barrels, which had a few days before been inspected, and regularly

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marked and branded by the plaintiff; but that, on his finding the above deficiency and falsehood in the tare, he insisted on reinspecting them, which the defendant refused to permit, and absolutely prevented from being done. It was further admitted, in order to try the plaintiff's right to inspect and weigh without request, that all the half barrels were deficient in weight, as well as falsely tared, and that the defendant was both owner and manufacturer.

To the case detailing these facts and pleadings, the defendant subjoined the following points, as what he should rely on in argument: 1st. That the declaration makes a demand, and requires judgment to be rendered for the poor of the city of New York, and Edward Ferris, whereas such a judgment cannot be given by law, under the act on which the suit is founded; 2d. That it is not averred in, nor does it appear by, the plaintiff's declaration, that the 884 half barrels of flour, alleged to have been falsely tared, and deficient in weight, were intended for exportation, without which the penalty would not arise; *3d. [*210] That the plaintiff having once regularly inspected, marked, and branded the said 884 barrels, was precluded from afterwards saying they were falsely tared, or contained less than their due quantity; 4th. That the plaintiff had no right to inspect or examine without request.

Riker, for the plaintiff. The first point raised resolves itself into this; that the declaration is on behalf of the plaintiff, and the poor of the city of New York, instead of being on behalf of himself and the overseers of the poor. It is, in effect, the same thing; for the overseers are to distribute and pay over to the poor, who are the persons actually interested. To name them was unnecessary, and totally insignificant. *Frederick v. Lookup*, 4 Burr. 2019; *French v. Wiltshire*, Andrews, 67. The action is given to "any person who will prosecute for the same." It might, therefore, have been in the name of the plaintiff only. This was settled by the third resolution in the first of the

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cases adduced. The answer to the second objection of the defendant is, that in the section of the act by which the penalties are imposed, general expressions are used, not confining them to flour, &c., intended for exportation, respecting which the antecedent clause contains directions. It must have been equally the intention of the legislature to protect the citizen from fraud as well as the stranger, and this was the reason of the generality of expression used in regard to the penalties. The construction we contend for derives support from the 7th section, which supposes an inspection previous to that on exporting. The third point receives an easy answer. The 384 half barrels had been inspected and branded only as to quality. Such a circumstance could never prevent the right to inspect the tare and quantity. An attention to these two different objects of inspection will remove all doubt on the last objection. Request is necessary to inspect, for the purpose of ascertaining the quality of flour to be exported; but not to detect imposition in weight and tare, and prevent defrauding the community.

Riggs, contra. The authorities cited are under the English statute of 9 Anne, c. 14, s. 2. By the words of that act it is expressly ordained, that "it shall be sufficient for the *plaintiff to allege the defendant or defendants is or are indebted to the plaintiff." No such words are in our law. In the case from Andrews, the plaintiff used words not mentioned in the statute. That gave the action to the informer; and the plaintiff, in stating the *per quod actio accrevit*, said, "to the king, the poor," and the informer, upon which the court decided, that naming the king and the poor was surplusage. Our objection is not that the plaintiff has said too much, but too little. He ought to have specified the overseers of the poor. A decision, therefore, on redundancy, cannot apply to an exception for deficiency. In the present instance, the court must find words giving authority to pronounce judgment

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in favor of the poor, or none can be rendered on this record. It is to be observed that the part of the declaration we complain of is in the demand of the debt. The render is asked for the plaintiff and "the poor;" it ought to have been the "overseers of the poor;" for the act directs one half of the penalty "to be paid to the overseers of the poor." No words in the introductory part of the declaration are to be rejected as surplusage, because it is the demand of what is due, and the rendition of judgment must be according to it. In debt for foreign coin, if the demand be that the defendant render the foreign money, no judgment can be pronounced. A doubt may be entertained how far the poor ought to have been named. It has been said they cannot sue. *Dickenson v. Clare*, (a), 2 Keb. 280. In *Balchin v. Clarke*, Barnes, 471, the court ruled the trustees of a turnpike act need not be named in a *qui tam* action, where half the penalty was given to them. But the statutes under which the suit was brought, the 26 Geo. II., c. 80, 28 Geo. II., c. 17, do not order the money to be paid to the trustees, as our law does to the overseers. On the second objection, we submit to the court, whether the object of the legislature was not confined to our foreign commerce, leaving the injuries and wrongs offered our domestic trade to the remedies the law previously afforded. If so, the allegation was indispensable.

The clause by which a double inspection is glanced at, does no more than say how often soever the casks have been inspected, still they shall undergo an ultimate one, at the *place of exportation. This provision was dictated by the sole view of guarding our foreign trade. Had the defendant been about to export the flour, then, indeed, I admit that the plaintiff might have insisted on inspecting; but in every other case we deny the right of doing so undesired. The arguments on

(a) This case is not law as to the point cited. See 7 Wens. Plead. 189, 191. A precedent *contra* by Mr. Tidd.

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the other side would make every baker, nay, every person owning a barrel of flour, liable to the inspection law, and also to the penalties, if falsely tared, or deficient in weight.

Hoffman, in reply. The first objection is as to form. The cases cited show it good. The statute of Anne gives the penalties imposed, one moiety to the informer, the other to the poor, and yet a suit by the informer only may be maintained. Therefore, here we may sue without the overseers. If it was competent for the plaintiff to use his own name alone, then the authority from *Andrews* is decisive. But as courts of law recognise trusts, and take notice of those beneficially interested, there can be no impropriety in naming the *cestui que trust*, instead of his trustee. The conclusion of the declaration is to the damage "of the said Edward," and this will warrant a judgment in his favor, on which he will, as to the moiety not given to him by the statute, be trustee for those entitled. The act makes it the duty of the owner to have an inspection as to the quality; of the officer as to tare and weight. The branding, therefore, the former, cannot prevent ascertaining the latter. Whenever there is a "reason to suspect" fraud in either of these, the officer has a right to inspect, without waiting for a desire to be made known, or confining the act to flour destined for exportation.

TOMPKINS, J., delivered the opinion of the court. Several points have been made for the consideration of the court; but we notice only one of them, which appears to us decisive. The object of the statute was, to prohibit the exportation of flour and meal, without being first inspected, in order to prevent those articles being brought into disrepute in foreign markets. Accordingly, the fourth section of the act provides, that no wheat flour, rye flour, Indian meal, or buckwheat meal, shall be shipped for exportation out of this state, before the same shall have been

[*213] *submitted to the view and examination, and ap-

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proved of and branded by one of the inspectors. The fifth section refers to the fourth, and relates to flour and meal manufactured for exportation. The subsequent provisions of the act also relate merely to flour and meal, purchased or manufactured for exportation. The words of the statute, therefore, and the object of it, confine the duties of the inspector, and the penalties to be incurred, to flour and meal shipped, purchased, or manufactured for exportation. In the present case, the inspector was not applied to for the purpose of inspecting the flour of the defendant, but what he did was in opposition to the express orders of Mr. Coles; neither is it averred, or proved, that the flour in question was either purchased, manufactured, or shipped for exportation. Upon this ground, we are of opinion the plaintiff is not entitled to recover; and it is, therefore, unnecessary to consider the other objections stated by the defendant.

Judgment for the defendant.

PAYNE *against* EDEN.

An action will not lie on a note given, with a blank for the date, on consideration of signing an insolvent's petition, and to be filled up after his exoneration, though subsequent to its being so filled up, the maker promises to pay it, and have a sufficiency in number and value without the payee, such note being void in its creation, and not capable of being set up by a subsequent promise. A note indorsed to a third person in trust for the benefit of some relative of the indorser's is, in an action by the indorsee, open to the same objections as if the suit had been by the indorser.

Assumpsit by the holder of a promissory note, made and indorsed under the following circumstances:

The defendant being about to take the benefit of the "act for giving relief in cases of insolvency," (a) applied to

(a) 1 Rev. Laws, 428.

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John H. Hurtin, one of his creditors, to sign his petition. This he agreed to do, on receiving, for the amount of his debt, a note payable 60 days after date, leaving a blank for the date, to be inserted after the discharge was obtained. In consequence of this, Eden signed the note on which the present suit was brought; and Hurtin, without annexing any affidavit of his debt, put his name, which was the very last, to the petition; though, exclusive of him, there was a sufficiency in number and value to exonerate the defendant. Four days after Eden had obtained his discharge, Hurtin filled up the blank left for the date, as if the note had been then given, and indorsed it over, in trust, for one of his relations, to the plaintiff. At the period when it fell due, the defendant was applied to for [*214] *payment, and promised he would discharge it, admitting it to be justly owing.

Upon these facts the judge advised a verdict to be taken for the plaintiff, subject to the opinion of the court how far the action was maintainable; and that it should be referred to the jury to determine on what consideration the note was given. This being acquiesced in, they found for the plaintiff, but that the note was made by the defendant previous to his discharge under the insolvent law, and in consideration of the payee's agreeing to sign his petition for a debt of the same amount as that specified in that note.

The case now came before the court on this single point, whether the action was maintainable or not?

Boyd, for the plaintiff. Every note of hand carries within itself *prima facie* evidence of a good consideration; and though, as between maker and payee, this may be inquired into, yet in the hands of a third person, the investigation is, unless suspicious circumstances intervene, in general shut out. This is the common rule: if there are any exceptions which take the present case out of it, they must be shown by the other side. But allowing the note to have been originally bad, the promise to pay it, made sub-

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sequent to the discharge, has rendered it good. A debt from which a party is released by a certificate, or operation of law, continues to exist *in foro conscientie*, and is revived by a promise to pay. The reason is, the duty remains, though the remedy be gone. This principle applies, with equal force, to a security for a debt. What is there to take this out of the common case of a blank indorsement, or a blank signature, left with a person to be afterwards filled up? It can never be impeached on account of the consideration between the original parties, for it takes effect from the filling up and delivery. The present question is not within the rule of the authorities that may be adduced; for, without the signature of Hurin, there was a sufficiency, in number and value, to give Eden his discharge. There could, therefore, be no fraud on creditors, as Hurin was the last who signed.

Caines and *Woods*, contra. General principles are against the action. To support it would be to defeat the provisions *of the act; the objects of [*215] which are, equality of payment, and exoneration of the debtor. Both, in the present instance, would be equally contravened. The note is void,(a) as a fraud against creditors. (*Cockshot v. Bennett*, 2 D. & E. 763; *Jackson v.*

(a) This position, first established in our courts by the case in the text, has been subsequently acknowledged in repeated decisions. Therefore, on a promise to pay the costs of an action in consideration of the plaintiff's not opposing the defendant's discharge under the insolvent law, an action cannot be maintained; (*Watts v. Harper*, 2 Johns. Rep. 386;) so a bond given to procure, upon the same consideration, certain notes for the plaintiff, cannot be enforced; (*Bruce v. Lee and Miliken*, 4 Johns. Rep. 410;) nor can a note by a third person to a creditor, to induce him to sign an insolvent's discharge; (*Yeomans v. Chatterton*, 9 Johns. Rep. 295;) for in all these cases the instrument is absolutely void in its creation. Were it not so deemed, a transfer to an innocent indorsee would defeat the whole policy of the law, and subvert the very principles on which it was enacted. Whereas, by striking at the legal existence of the security, the good effects of the statute are ensured, and the holder has only to look back to his privy on the common counts, or on the original transaction between them.

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Duchaire, 3 D. & E. 551; *Jackson v. Lomas*, 4 D. & E. 763; *Shirley v. Martin*, Excheq. 14th November, 1779; *Holland v. Palmer*, 1 Bos. & Pull. 95.) No recovery, therefore, can be had on either a bond or note, given on such a consideration. *Sumner v. Brady*, 1 H. Bl. 647. To say that there has been no fraud here, because there were signatures enough without Hurtin, and that he did not swear to his debt, is no answer to the authorities cited.

Decisions are to be framed on the broad principles of general law, and the spirit of the act is to govern. By the 3d section, a creditor is not to receive anything "in action." This, it is true, is confined by the words of the act to creditors swearing to their debts. But the case before the court is within the spirit of the law, and, therefore, to be decided by it, "lest," according to Lord Coke, in *Twyne's Case*, "the good provisions of the law, by a little addition, and evil intention, should be defeated." A further reason may be added; if the note was given in consideration of Hurtin's signing the petition, then, if he did not sign as the law requires, the consideration has failed, and the action cannot be maintained. Besides, the note was void for want of consideration, as without Hurtin there was number and value, and his name, therefore, useless. So absolutely void are securities of this nature, that money had and received will lie for what has been paid on them; (*Smith v. Bromley*, Doug. 696, n.;) nay, so jealous is the law on these points, that an agreement to give additional security for a composition cannot be enforced. (*Leicester v. Rose*, 4 East, 372.) It is not merely as a fraud on creditors that securities of this nature are void. They are so from a species of duress,^(a) under which the debtor is supposed to be. *Sumner*

(a) Therefore, if a debtor who has obtained his discharge under the insolvent law be afterwards taken in execution upon an antecedent judgment, and to obtain his discharge, give a note, the court will, in a summary way, order the note to be given up; but if the maker has been sued on it, and has pleaded, it will be on payment of costs. *Sturges v. Pitt*, January, 1802, MS. Kent, Ch. J.

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v. *Brady*, and the other cases referred to. These principles are not the result of statute law; for, to use the words of Lord Mansfield, "it was wrong before any provision was made by statute against it." *Smith v. Bromley*, already cited. That the note is in the hands of *a [216] third person, is immaterial; for when an instrument is void in its creation, it is not available in the hands of even a *bona fide* holder. *Lowe v. Waller*, Doug. 785.(a) It is true, this decision was under the statute against usury. But the principle is the same, whether an instrument be void by statute or common law. For, when a statute adds one thing more to the list of illegal contracts, it does not make a new rule of law for that particular thing, but only refers one more case to be governed by old principles.(b) The promise, therefore, to pay the note could not render valid the instrument on which this suit is founded; for, according to Buller, J., in *Cockshot v. Bennett*, (2 D. & E. 763,) "if the security were void, no subsequent promise can set it up, for it must be recollected, that the promise which is relied on is to revive the note." A distinction, therefore, is to be taken between the debt and the security. The first was lawful in its creation, the other never had legal existence. Therefore, adds Buller, J "this is not like the case of *Trueman v. Fenton*," Cowp. 544. This reasoning applies to the argument of signing and indorsing blank paper; that is not illegal, but the giving the note by the defendant was against law at the time he delivered it, and could not be made good by any *ex post facto* act. A further reason may be assigned against the *jus tertii*. It does not appear that the plaintiff gave any value; he is admitted to be a

(a) It is on this principle, that if a married woman sign a promissory note, a promise by her, when a widow, to pay it, does not establish the note, which was void in its creation. *Lloyd v. Loq*, 1 Stra. 94.

(b) Therefore, if a statute give power to the crown to issue an extent on a bond, that extent shall have the same effect as an extent issued upon a statute staple, or judgment at common law; for new things are governed by old laws. *Lane v. Cotton*, 1 Salk. 18. 1 Ld. Raym. 654, and see also *Res v. Cotton, Parker*, 139.

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trustee for a relation of the payee. This throws an air of suspicion on the whole transaction, and lays it open to the same inquiry as if the suit was between Hurtin and the defendant. *Grant v. Vaughan*, Burr 1516; *Miller v. Race*, 1 Burr. 452.

Riggs, in reply. The cases cited are exceptions to the general rule, that a promissory note ought to be paid. The question is, is this such a case? On the score of fraud, every argument has been anticipated; but on the point of *duress*, it remains to show the reasoning of the other side does not apply. So long as there is a deficiency in number and value, the debtor may be said to be under *duress*; but when the petition is subscribed by the proper number of creditors, whose debts amount to the sum required by the act, that *duress* must cease, and the deduction fail. There is nothing, therefore, to prevent maintaining the suit. The note must be taken to have [*217] been delivered *only when it was perfected; that was, after the bankruptcy; and the promise to pay made it good by relation to that time.

THOMPSON J., delivered the opinion of the court. This action, we think, cannot be sustained. The consideration for which the note in question was given undoubtedly was, that the payee should become, under the insolvent act, a petitioning creditor for the maker, though for a debt *bona fide* due. Why the defendant, under the circumstances stated in the case, should be induced to give the note, is not easily discernible. He had a competent number of petitioning creditors without Hurtin. But, whatever the reason might have been, the inducement for giving the note, according to the facts stated in the case, was, that Hurtin should become a petitioning creditor. We consider the transaction to have been founded in fraud, and against the policy of the insolvent act. Although others might not have been induced to become petitioning creditors by

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Hurtin's example, yet, motives of humanity might have influenced them to it for the purpose of extricating the defendant from his embarrassments, and which they ought, and probably would have withheld, had they supposed him liable to any of his creditors after his discharge. If this note be valid, Hurtin not only secured to himself a benefit not common to all the creditors, but will receive more than the amount of his demand. He receives the dividend of the insolvent's estate, which, for any thing that appears, might have been twenty shillings in the pound, and besides, recovers his whole debt against the defendant on the note. This would be a fraud upon the other creditors; for, if Hurtin's demand be extinguished by the note in question, the dividend of the insolvent's estate, among his other creditors, must be increased. We, therefore, view the transaction in no other point of light, than as founded in fraud, the note consequently, void in its creation, and being so, the subsequent promise will avail nothing. Contracts not founded in fraud, or on immoral considerations, may be revived by subsequent promises, though before such promise there was no legal remedy. This, however, applies only to cases where the contract is voidable, and not where it is absolutely void. In such cases, no subsequent promise can revive it. It is *a mere [*218] *nudum pactum*. Hurtin's debt was annihilated by the defendant's discharge under the insolvent act, and he was under no obligation in equity or good conscience to pay the debt, so as to raise a consideration for the subsequent promise.[1]

[1] A note executed by a debtor to a creditor, to induce him to withdraw his opposition to the debtor's obtaining his discharge under the insolvent law, is void. *Wiggins v. Bush*, 12 J. R. 306.

A promissory note given on the sale of a chattel fraudulently represented by the seller to be of great value, when, in fact, it was of no value, is without consideration and void. *Still v. Rood*, 15 J. R. 230.

Fraud in the sale of a chattel cannot be set up in bar of a recovery of a note given on such sale, unless the vendee, on the discovery of the fraud, re-

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We take it for granted, from the admission stated in the case, "that the note in question was held by the plaintiff as trustee, and for the benefit of some relation of John H. Hurtin," that we are to consider the cause in the same point of view as if the original parties were now before us. Under these circumstances, the opinion of the court is, that the defendant is entitled to have judgment.

turns the article purchased to the vendor, or shows it to be entirely destitute of value. *Barton v. Stewart*, 3 Wen. 136.

If a note is given for a particular purpose, and the object for which it was given should fail, the payee ought to retain the note; and if he should bring an action upon it, the note should be taken in connection with the agreement, so as to prevent his recovery. *Denniston v. Bacon*, 10 J. R. 198.

As where a note was given to be offered by the payee for discount on certain terms, not appearing on the face of the note, of extended credit and payment by instalments, and the proceeds to be applied in a particular manner, the payee, on failing to obtain the discount, transferred the note, with notice of the agreement: held, that the indorsee could not maintain an action. *Id.*

If a sheriff, on arresting a defendant, take from him the promissory note of A., indorsed by the defendant in blank as security, the assignment or transfer is illegal and void, being contrary to the statute concerning sheriffs; and in an action by the sheriff, as indorsee against the maker, the latter may avail himself of the fact to defeat the action. *Strong v. Tomkins*, 8 J. R. 98.

A note made by an administrator, as administrator, by which he promises to pay, &c., for value received by the intestate and his heirs, is void, for want of consideration. *Ten Eyck v. Vanderpoel*, 8 J. R. 120.

It seems, that a note given for a pretended title is not void in the hands of an indorsee. *Baker v. Arnold*, 3 Cal. R. 279.

It seems, that a note given by a deviser in his lifetime to secure a devisee in a will against the alteration or revocation of the will, is without consideration and void. *Winchell v. Latham*, 6 Cow. 682.

Where the owner of a slave told him, that if he could procure good notes for \$200, &c., he would immediately manumit and set him free; and the slave procured the notes and delivered them to his master, who delivered a deed of manumission, and procured a regular certificate from the overseers of the poor, according to the statute, but refused to deliver the deed to the slave and kept it two years, during which time he held him as a slave. In an action brought on one of the notes, against the maker, held that there was a failure of the consideration, and the plaintiff could not recover. *Petry v. Christy*, 19 J. R. 52. N. Y. Dig., vol. i, p. 286, *et seq.*

Ely v. Van Beuren.

ELY against VAN BEUREN.

After verdict in a justice's court in an action for a penalty, it will be intended that the offence proved was such as warranted the penalty declared for, and, therefore, all want of form in the declaration cured. In such a suit, if only a portion of the penalty be demanded, it will, after verdict, be intended the residue was waived, and the defendant below cannot assign for error that less was recovered than might have been sued for. Alleging a fact, which is no offence, and for which damages appear not to have been given, is not error, and only matter of aggravation.

ON CERTIORARI. The suit below was under the 15th section of the act^(a) concerning slaves and servants, to recover the penalty of 12 dollars and 50 cents, for trading with the slave of the plaintiff. The declaration was for only 12 dollars and 50 cents, stating the trading to be the amount of two dollars, and that the defendant had also inoculated the child of his slave.

The errors submitted were, 1. That the kinds of goods sold were not set forth. It might have been liquor; and then, under the 15th section, the penalty was only five dollars; 2. That the plaintiff should also have declared for the treble value of the articles traded in; the action having been for only half of the forfeitures incurred, for the two sums of 12 dollars and 50 cents, and the treble value of the goods, make but one penalty; 3. That the inoculation complained of was no offence.

Per Curiam. We must, after trial, intend that the trading was shown by proof to be within the 15th section, and was not for strong liquor. As to the suit being for only a part of the penalty, it is clear that the plaintiff was entitled to what he did demand, the 12 dollars and 50 cents; he might have waived the treble damages, as he had a right to do, and the defendant below cannot complain that

(a) 1 Rev. Laws, 618.

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the plaintiff has recovered less than he might have sued for. The parties appeared at the trial, and no objection was taken to the form of the declaration; every informality of it is, therefore, cured; and we must now in-
 [*219] tend the substance of it was proved. *The inoculation, therefore, was idle and null. It was but mere aggravation, and, as only a single penalty was recovered, it is evident no damages were given on that account.
 Judgment affirmed.

PETRIE against WOODWORTH.

Where a name appears to be a foreign one, a variance of a letter, which, according to the pronunciation of that language, does not vary the sound, is not a *misnomer*. Declaring for damages "on account of not fulfilling a contract for a lot of land," in a certain place, is, before a justice, sufficiently certain.

IN ERROR on *certiorari*, the exceptions were, 1st. That the defendant below pleaded in abatement a *misnomer*, in being sued as *Petrie* instead of *Petrie*; 2d. That the declaration was uncertain and insufficient.

Per Curiam. It was not a *misnomer*. It was the same surname, with the misspelling of one letter. The pronunciation would still be the same in French as the name seems to import.[1] It may also be well inferred from the

[1] The New York Code (sect. 175) provides: when the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding, by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

A middle letter in one's name being no part thereof, a variance in this respect between a written contract as set forth in the pleadings, and that produced in evidence, is immaterial. *Milk v. Christie*, 1 Hill, 102.

A variance in the name of a corporation which does not render it materially different in substance from the true name will not injure, especially in proceedings in which the corporation is not a party to the record. *The People v. Runkles*, 9 J. R. 147. N. Y. Dig., vol. 4, p. 770, *et seq.*

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return, that it appeared to the justice that the defendant was as well known by one name as the other, if they be different; and such a replication to such a plea is good. The second objection has no weight. The declaration is good enough. It was "for damages, on account of the defendant's not fulfilling a contract for a certain lot of lease land, lying in German Flats." We are of opinion that the judgment be affirmed.[1]

MANNY *against* DOBIE.

It is error in a justice to award a *venire*, on a default, or when a defendant does not plead.

ON CERTIORARI. The defendant below refused to plead, on which the justice awarded a *venire*, which was now assigned for error.

Per Curiam. The judgment must be reversed. The award of a *venire* was erroneous. It cannot be done on a judgment by default, or where the defendant does not plead. An issue must be joined.

[1] The declaration alleged a contract to sell "a crop of barley, supposed to be about nine hundred bushels," and the one produced in evidence was, to sell "a crop of barley, about nine hundred bushels;" held, not a material variance. *Conley v. Anderson*, 1 Hill, 519.

So the declaration stating a contract to deliver barley "on or before the 1st day of November;" held, not a material variance, though the contract given in evidence was to deliver the barley "by" that day. *Id.*

A variance between the declaration and proof must be objected to at the trial, and if not objected to at that time, the party cannot afterward avail himself of it. *Pike v. Evans*, 15 J. R. 210. N. Y. Dig., vol. 4, p. 772.

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 SMITH and DELAMATER *against* RICHARDSON.

If in consequence of a breach of contract in not transporting goods, they be sent by another conveyance, and lost, damages cannot be recovered for their value as at the port of destination, nor will they be allowed for interest lost in consequence of not being in cash for them at the time when they otherwise would have been sold.

GOLD moved to set aside the report of referees in this suit, on an affidavit stating, that it was instituted to recover damages for a breach of contract, in not transporting 5,000 staves, belonging to the plaintiffs, from Chaumont, in the county of Oneida, to one Esseltyne's, on the river [220] *St. Lawrence, in consequence of which, the plaintiffs themselves undertook to do it, at an unusual season of the year; and in the attempt, the raft was cast away, and 600 staves lost. That under these circumstances, the referees, in assessing the damages, estimated them at the full value which the staves would have brought at the Montreal or Quebec market, and reported 341 dollars due. This, he contended, was, in the first place, an improper rule to go by: for, should even the defendant be liable for the amount of the staves lost, it could be only for so much as they were worth on the spot where they lay.^(a) But, secondly, he argued, that the report ought to have been for damages merely on account of the breach of the contract, which was to transport for 37 dollars, without any regard to the property in question; especially as the plaintiffs had, by their unwarrantable conduct, exposed it to unusual and excessive risks.

(a) But for goods embezzled or lost on a voyage, though without fraud on the part of the master, he is, under the bill of lading, liable to damages according to the net value at the port of delivery. *Watkinson v. Laughton*, 8 Johns. Rep. 212, see also *Elliot and Stewart v. Russell and Lewis*, 10 Johns. Rep. 1, as to liability of owners of vessels on inland waters who carry for hire.

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Emott, contra, urged, that the action, as appeared from the declaration, demanded damages for five several reasons: 1st. For goods sold and delivered; 2d. For the loss of 600 staves; 3d. For the breach of the contract, in consequence of which the staves could not be delivered in season, and thereby the plaintiffs suffered from a depreciation in the market; 4th. For a loss and injury sustained, in being obliged to transport in an unfavorable and dangerous season, at greater hazard and expense; 5th. By way of interest on the price of the staves from the time when they would have been disposed of to that at which they were actually lost. That, therefore, the report might be founded on the value of the goods sold, and as the sum at which the referees assessed the damages, might have been the actual loss to the plaintiffs, by not having their property at market in due season, the application ought not to be granted.

Gold, in reply. The goods sold and delivered, were furnished in payment of the 37 dollars consideration money for transporting the staves. Besides, on a contract where the sum paid was so small, it is contrary to all reason to make the party to perform insure the articles against the hazards of the voyage, and that, too, at an unreasonable period. Nor can he, with greater propriety, be called on to compensate for a loss of market; for, had he entered on his undertaking, *non constat*, the staves would have arrived.

*TOMPKINS, J., delivered the opinion of the [*221] court. The affidavit, on the part of the defendant, alleges that the cause of action presented by the plaintiffs to the referees, was the non-performance, by the defendant, of a contract to transport staves belonging to the plaintiffs.

For the plaintiffs it is alleged, that evidence was adduced by them in support of five grounds of action. The first

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ground it was incumbent on the plaintiffs to prove, in order to make out the consideration for the defendant's promise, which is stated to have been goods sold and delivered; and the other four grounds grow out of the special contract. The affidavits are, therefore, reconcilable.

We are inclined to think the referees have adopted an incorrect principle, in fixing the damages of the plaintiffs. The price which the articles to be transported might have brought at the Quebec or Montreal market, is too uncertain and unreasonable to be admitted as a rule of damages; neither ought the referees to have taken into the account interest upon such price.[1] It also appears, that upon the

[1] When work is done under a special contract but not in conformity to it, and there is a recovery against a party who is not in fault, an ample allowance should be made for all such damages as the defendant has sustained by any departure from the contract. *Ladue v. Seymour*, 24 Wen. 60.

The damages recoverable against carriers for the negligent loss or injury of goods entrusted to them for transportation, are to be ascertained by resorting to the price, which goods of the same kind and quality bore in market at the time the injury occurred; and this, though subsequent experiments in the use of such goods have resulted in showing, that the market price was almost wholly imaginary, their real value being little or nothing. *Smith v. Griffith*, 3 Hill, 333. See *Smith v. Richardson*, 3 Cal. R. 219; *Bracket v. M'Nair*, 14, J. R. 170; *Watkinson v. Laughton*, 8 J. R. 213; *Elliot v. Russell*, 10 J. R. 1.

Thus in an action against common carriers for a negligent injury to a quantity of mulberry trees which had been delivered to them for transportation, after the plaintiff had given evidence of the market value of the trees at the time the injury occurred, the defendants offered to prove, that trees of the same species had since been ascertained, from actual experiment, to be of no real value—that their market value at the time of the injury, was fictitious,—that they were not worth cultivating with a view to the raising of the silk worm,—that those in question were purchased by the plaintiff for the purpose of growing seedlings for sale, and that they were of no value for such purpose the next year after the purchase; held, that the evidence was inadmissible. *Id.*

Evidence of a latent defect in the trees in question, which developed itself after the injury complained of, whereby they proved inferior in value to healthy trees of the same species would have been admissible. *Id.*

In cases where the market value of goods is the proper test of damages, the law contemplates a range of the entire market and the average of prices as thus found, running through a reasonable period of time; not any sudden

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defendant's failure to fulfil his engagement, the staves were taken into the possession of the plaintiffs, and lost by them, in attempting to transport them at an unusual and very dangerous season. It is, therefore, questionable, whether the entire loss of the staves is not attributable to the imprudence and default of the plaintiffs; but even if the defendant is answerable for them, the value of the staves at Chaumont, and not the possible market price at Quebec or Montreal, ought to have governed the referees. We are, therefore, of opinion, the defendant ought to take the effect of his motion.

Motion granted.

 THE PEOPLE *against* SMITH.

If an attorney withhold the money of his client, this court will afford relief in a summary way, without driving the client to an action.

PENDLETON having, on a former day, obtained a rule to show cause why an attachment should not issue against the defendant, for appropriating money collected for his client, who was in prison, now moved to have it made absolute; and in support of the application, cited Say. 51, 169; 4 Burr. 2060; Stra. 621, and 1 Burr. 654.

Woods, contra, insisted the proceeding was unwarranted; that the money was retained for costs and other demands, *and if such a measure was adopted it [*222] would be placing an officer of the court in a worse

and transient inflation or depression of prices, resulting from causes independent of the operations of lawful commerce. *Smith v. Griffith*, 3 Hill, 333. See *West v. Wentworth*, 3 Cow, 82.

The price paid for an article by a party, whose damages depends upon the market value of it, may be given in evidence against him in ascertaining such value. *Id.* N. Y. Dig., vol. 2, p. 646, *et seq.*

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situation than any other citizen, as he would thus lose the benefit of a trial by jury.

Per Curiam. There is no doubt of the authority of the court to proceed against attorneys, for misbehavior, in this summary way. The case in Say. 169, is in point. The defendant's conduct has been so very improper, that we are bound to interfere. We, accordingly, by a special rule, direct that he exhibit to the clerk of the court, in New-York, within ten days his, counter demands for costs, and, if any balance appear due, on liquidation of the accounts, that he pay it in twenty days, or the attachment issue.[1]

JACKSON, *ex dem.* WILBER, *against* BROWNELL.

A sheriff's sale of lands under a *fi. fa.* is not void, because on a judgment confessed on a bond given by a man otherwise in debt, and the obligee declare he means to befriend the obligor and his family, one of whom is accepted as the purchaser under the execution, without paying the sheriff the consideration money, and the family of the obligor continue in possession as before. *Aliter*, if it appear the bond was not for an actual debt.

IN EJECTMENT, the lessor of the plaintiff made title under a sheriff's sale, by virtue of a *fi. fa.* issued on a judgment against George Brownell, signed the fifth of August, 1801, in a suit instituted before October term, 1800. The defendant relied on a sale by virtue of a *fi. fa.* upon a judgment by confession, on a bond for 4,000 dollars, dated the 1st of October, 1800, to one Bradford Richmond, under whom she held.

Upon the trial, it appeared that Richmond himself was a man of no property; but that he, having been deputed by

[1] Where an attorney keeps the money of his client, which he has collected, without a legal right to do so, he will be compelled, on motion, to pay the same, with the damages allowed by statute. *Dunn v. Vannerson*, 7 Howard's Miss. Rep. 579.

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several persons to recover debts due them from George Brownell, had taken from him a bond and warrant of attorney for the various amounts on which the judgment by confession had been obtained, and had settled with the creditors of Brownell for their respective demands, by giving his own responsibilities. That, however, on the day of sale, no money consideration was seen to pass from the defendant, who was the daughter of the obligor, to Richmond, he only acknowledging her bid, and giving a receipt for 4,000 dollars, for which sum there was a report she had given her notes. That, from the conduct of Brownell's family at the vendue, there seemed to be no uneasiness of mind at the circumstance of his property being sold; on the contrary, they appeared anxious to bring it as much under it as possible; and that, since the period of sale, the family of the obligor *had resided on the [*228] lands in question, without any apparent alteration in the manner of working and conducting them, from that which was before observed. In addition to these facts, it was in testimony, that, previous to the auction, Richmond had expressed himself in a very friendly way with respect to the obligor, by saying he did not wish to injure him, and intended to give him a chance.

From these circumstances, it was contended the sale was fraudulent, and the judge charged, that if the jury believed the bond and warrant of attorney were given to Richmond upon an assurance or understanding that, on the consequent sale which might take place, some favor or benefit should be shown or allowed to Brownell, or his family; or that there was any secret trust or confidence between Brownell and Richmond for that purpose, it would be evidence of fraud against the creditors; and although the amount for which the bond was given was due, their verdict ought to be for the plaintiff, in consequence of which they so found.

It was now submitted to the court whether the judge

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had not misdirected the jury, and the verdict, they in consequence rendered, ought not to be set aside.

LIVINGSTON, J., delivered the opinion of the court. Were it certain that the jury proceeded on the ground of Richmond's demand being fictitious, we should not disturb their finding. The probability, however, is, that they acted under a belief of Richmond's having promised, or that there was an understanding between the parties, that, in the disposal of his property, favors should be shown to Brownell and his family. This would have been in conformity with that part of the direction of the learned judge who tried the cause, which is supposed to be incorrect. Whether it were so or not, will now be examined. Such understanding, with respect to personal property, it is conceded, would have been fraudulent; but it may well be doubted whether the considerations, which govern cases of this kind, apply to real estates.[1] These arrangements between debtor and creditor are not deemed fraudulent, because of any illegality in the transaction, as it regards the parties themselves, but on account of their tendency to deceive and impose on third persons. It were a cruel policy in any code of laws to interdict every species of favor to an *unfortunate debtor, under the penalty of vacating all securities taken on those terms. On the contrary, a creditor may be as indulgent and show what favor he pleases, as the price of obtaining security on land for a doubtful debt; care must only be taken that there be no secret understanding constituting a trust in the creditor, in derogation or contravention of the ostensible alienation, or the transfer will be deemed a cover by which other creditors will not be prejudiced, or, in other words, a change of estate will not, under such circumstances, be

[1] The bare fact of a grantor remaining in possession of lands, conveyed by him to a third person, is not enough, uncorroborated by other circumstances, to subject the transaction to the imputation of fraud. *Every v. Edgerton*, 7 Wend. 259.

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considered as having taken place. But nothing of this kind occurred here. It is not denied that the land passed by the sheriff's deed to Richmond, nor pretended that he holds it in trust for Brownell, or any of his family, but only that he had no right to obtain judgment, on a promise to permit them to remain in possession, on terms of particular favor. In this promise we perceive nothing illegal. If Richmond's debt were in danger, and he could not obtain judgment on his own terms, he must submit to those of his debtor, who, in giving a new security, had a right to make the best bargain he could, so that others were not defrauded. What was to have prevented Richmond's taking a mortgage for his debt on this very property, payable on the death of Brownell, and with an express agreement that the latter should enjoy the premises during his life, or for a shorter period? or receiving an absolute deed in extinguishment of his debt, under an agreement to give a lease immediately to Brownell, for one or more years, or as long as he might live, at a pepper-corn per annum? Agreements of this nature can only be impeached on a supposition that there is no difference between such cases and that of Twyne. A moment's consideration must convince us of the contrary. Besides that, Twyne was prosecuted on the 13th Eliz. cap. 5, for making and publishing a fraudulent gift of goods; not one of the badges of fraud there relied on exists here.

1. The gift in that case was general, without excepting apparel, or any thing of necessity. Here was no gift at all, but a judgment which could only be satisfied by a subsequent public sale, and of so much property only as might be worth the debt.

*2. Twyne's debtor continued in possession, used [*225] the goods as his own, and thereby defrauded and deceived those with whom he traded. This could not happen here. The defendant held the premises under Richmond, and paid rent. But if she had occupied them gratis, possession of real property is not considered as such evi-

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dence of title, as to give the occupant a credit in consequence of it. The party may be a tenant of the lowest grade, or the property may be encumbered beyond its worth, which is often the case, long after the mortgagor's possession continues. The reason, therefore, why possession of goods (which is generally the only criterion of this species of property) after sale is considered fraudulent, fails altogether when applied to lands.

3. In *Twyne's Case*, the gift was made in secret. This transaction was as public, as matter of record, and a sale at auction could make it.

4. It was also made pending a writ. This does not appear to have been the case here. A debtor, after suit by one creditor, has undoubtedly a right, where no bankrupt laws interfere, to confess judgment to another, or to give him any other preference or security he pleases. All that appears here is, that Meeker's suit was commenced before the third Tuesday of October, 1800, and that the bond to Richmond was executed the first day of that month, so that the latter may have been prior to any *lis pendens* against Brownell.

The two last *indicia* of fraud in *Twyne's Case* were a trust between him and his debtor, and the gift's stating on its face, that it was made honestly, truly, and *bona fide*. Neither of these marks appear here.

Our opinion, therefore, is, that no assurance by Richmond to show favor to Brownell or his family, as far as it respected his real estate, or any secret trust or understanding between them, for that purpose, can avoid the judgment or sale made under it. It will always be borne in mind, that a conveyance was not to be made by Brownell himself to Richmond, which would have put it in his power to aliene a valuable estate, for a trifling debt, but that it was to proceed, and that after public advertisement, from a *public and sworn officer. At this vendue any one could bid, and his other creditors might have prevented the land selling for less than

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its value. Not having done this, they have no right to complain of the price, or of the indulgence shown to the former proprietor or his family.[1]

New trial, with costs to abide the event of the suit.

[1] Where a judgment was confessed by a party, after an injunction had been granted against him in chancery, interdicting all conveyances, &c., but at the time of the service of the *subpoena*, did not appear, nor was actual notice given to the plaintiffs, to whom the judgment had been confessed, before it had been docketed; a sale under it was held valid, notwithstanding the *lis pendens*. *Jackson v. Roberts*, 1 Wen. 478.

Where the defendant has no title to land sold on a *fi. fa.*, for which the sheriff has given a certificate of sale to the purchaser, and indorsed the sum bid on the *fi. fa.*, relief will not be granted on motion, but the purchaser should go to a court of equity. *Lansing v. Quackenbush*, 5 Cow. 38.

An agreement between persons having separate and distinct interests, not to bid against each other at a sheriff's sale, but to divide the profits of the purchase, is against public policy; and is fraud upon other persons interested in the sale. *Id.*

It seems, that an attorney who issues an execution cannot become a purchaser at the sheriff's sale, either on his own account, or as the agent of a third person, without the consent, and against the interest of his client, and leaving the client's debt unsatisfied. *Id.*

Where the client himself is not prohibited from purchasing, the attorney may purchase, with his assent; and neither the defendant in the execution nor a third person can object to the validity of such a purchase. *Id.*

A purchase made by a person standing in the execution of agent or trustee for the sale, however fair and honest it may have been, must be set aside on the application of the *cestui que trust*, or principal; if such application is made within a reasonable time. *Id.*

If the application is not made within a reasonable time, it will be considered as a waiver or abandonment of the right. *Id.*

What shall be deemed a reasonable time has not been settled by any fixed rule; and seems to depend upon the exercise of the sound discretion of the court, under all the circumstances of each particular case. *Id.*

A person who is incapacitated from purchasing on his own account cannot purchase as the agent of a third person; neither can he become a purchaser through the intervention of another. *Id.* N. Y. Dig., vol. 4, p. 1107, *et seq*

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LIOTARD, D. W. CROMMELIN, and B. I. CROMMELIN
against GRAVES.

If a vessel be destined for a port which is suspected to be blockaded by the British, with directions to call at a particular place for the orders of the correspondent residing at the blockaded port, and to whom she is unqualifiedly addressed, it is not a breach of duty in him to order the vessel to his own port; and if she be taken in going there, and condemned for being guilty of a breach of blockade, the correspondent, if he appear to have acted in good faith, will not be liable. On an open account current, interest is not allowable, unless by the custom of the trade or private agreement.

ASSUMPSIT to recover the balance of an account current, the amount of which was allowed to be just, provided the plaintiffs were entitled to compound interest on the annual rests, and had not made themselves liable for the value of a cargo consigned to them by the defendant and George Barnewall. To ascertain these points, the case which had been referred to arbitration by consent, now came up for the direction of the court on the points of law, all objections as to the right of setting off the misfeasance of the plaintiffs being waived.

From the voluminous correspondence spread before the court, and admitted as true, the following appeared to be the facts principally relied on.

Upon the 24th of July, 1798, the plaintiffs received a letter from the defendant and his then partner, Mr. Vos, dated the 14th of June preceding, which said, "We have found a ship which shall be the bearer of 51 casks, &c. It is the brig Columbia, which, it is thought, will sail the 24th instant. The insurances will be made here, but our underwriters would not do it, unless with the clause that the war risks shall terminate with the dropping of the anchor in the Texel. Therefore, be cautious, and take seasonable measures to cover us if there should be an open rupture between you and your sister republic, and this republic,

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which, in our opinion, is unavoidable. Perhaps the concerned will let her run into Hamburgh for your orders, which give, in every event, to Boue & Co., for the vessel and cargo are under our direction. Should the one or the other come to you, prepare yourself to expedite her with all despatch, with 200 pipes of *gin (pre- [*227] ferably from Shimmel) and such other goods as we shall advise you. If we have any thing in your hands, be careful, in the name of heaven, to get it out of the country before a confiscation of our property may take place." In consequence of this letter, the plaintiffs, on the 4th of August, wrote to Boue & Co., thus: "Messrs. Vos & Graves, of New York, have shipped on board the brig Columbia 51, &c., intended for us. From the manner in which these friends write us, it is possible the vessel may come to you, but they signify to us positively, that the captain must follow the orders we shall give you; if, therefore, he arrive in your port, and the winds remain as at present, which circumstance naturally drives the English off our coast, you will have the goodness immediately to order him for this place, where he will enter without hindrance, as has lately been the case with other American vessels. But for the purpose of your orders reaching the captain without delay, we request you to transmit them to him at the mouth of the river, so that he may receive them immediately." These instructions were punctually followed by Boue & Co., who, on the arrival of the Columbia at Cruxhaven, forwarded to Weeks, her master, the directions given to the plaintiffs. On receipt of them, Weeks, unwilling to comply with their contents, repaired to Hamburgh (after forwarding a letter from the defendant to Liotard & Co.,) to converse with Boue & Co., on the propriety of adhering to the orders, and Boue & Co. advised waiting eight days, to afford an opportunity of communicating with Liotard & Co., on the occasion. This Weeks refused to do, unless Boue & Co. would give him a written injunction to that effect. They declining to

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do this, he, in obedience to the directions transmitted by Boue & Co., sailed for Amsterdam, though he knew it to be blockaded, and was, on the 20th of August, taken by a British frigate, and sent into Yarmouth. On the very day of the capture, the plaintiffs received the letter forwarded to them by Weeks from Cruxhaven, dated the 30th of June antecedent, in which the defendant and his partner say, "the brig Columbia, Benjamin Weeks master, with her cargo bound to your port, we have consigned to you; but, from motives of precaution, and with [*223] the consent of *the underwriters, she will touch at Hamburg for your orders. Immediately on receiving the present, you are to ascertain: 1st. Whether your ports are in a state of blockade; 2d. Whether American property will be safe in your port, and on shore, during the Columbia's stay with you. If you have the least apprehension respecting the latter, or if the former is actually the case, the Columbia is to unload and sell her cargo at Hamburg, and your friends must despatch her immediately for this place, with 100 pipes of gin, &c. Confiding in your good judgment to act for the best of our interest, we remain," &c.

Upon the 21st of August, the plaintiffs wrote to Boue & Co., the following letter: "We have, since our last, received the honor of your's of the 17th instant, by which we learn, with much pleasure, that the ship Columbia, B. Weeks, of New York, is safe arrived in your river. We find that having received your letter at Cruxhaven, he had left his vessel there, and proceeded in person to see you, for the purpose of receiving your orders. That, notwithstanding his disinclination for going into the Texel, on seeing your orders, he prepared to return to Cruxhaven, and try his luck. It would afford us much pleasure if he proceeded to enter. However, if we had received sooner the letter last forwarded us from Messrs. Vos & Graves, we should, considering the modifications therein contained of their former orders, have requested you to ascertain precisely

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whether he could have proceeded through the Wadden. If not, you might have procured him other papers, and sent him to the port of Delfziel, taking care to give him a good pilot to carry him there. If, at the receipt of this, he shall not have yet sailed, you may still try to prevail upon him to adopt this measure, which will likewise be proper, in case he happens to be sent off, on attempting to enter our ports. But if you can noways induce him to do so, then you may unload the cargo, and send it to us, through the Wadden, as soon as possible, and we will avail ourselves of the same channel, and send him his return cargo, of which we will give *you the [*229] particulars. We thank you for the precision with which you have executed our orders. Upon the 27th of August the plaintiff received from the defendant and his partner, a letter dated the 29th of the antecedent June, saying, "We have the pleasure to enclose a bill of lading and invoice of the cargo of brig Columbia, Benjamin Weeks master, bound to your port, and on our account consigned to you. Please to dispose of the same to the best advantage, and lose no time in reloading this vessel with 150 pipes of gin, &c. As to the quantity, you may add or diminish so as to make the invoice amount to about 50 or 55,000 dollars; and whatever the sales of the outward cargo will amount more, you will place to account, &c. Should the forementioned goods not fill the brig, you may augment the gin. You will be careful to advise us, by different opportunities, of the probable amount of the return cargo, and the time when she is likely to sail, in order to make insurances here. We enclose a price current for the information of you and your friends, which will enable you to augment or diminish in the quantity of those articles we order according to the price it bears with you, not losing sight of our intentions to have the Columbia return with a full cargo; and, respecting French brandy, we have to observe, that we would give it the preference to gin, if a pipe of the former was to cost 25 per cent. more

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than the latter. There are 70 shooks of casks, which formerly held gin, if there is time sufficient to have them coopered, we would rather have the gin you send started in them, as it keeps the spirit clear, or you will have it in your power to dispose of them to advantage. Captain Weeks may be in want of some new rigging and sails, with which please to supply him; but let all needless expenses be avoided. Relying on your zeal for our interest, we remain," &c. Soon after this, the news of the capture of the *Columbia* having reached the plaintiffs, they entered into a long exculpatory correspondence with the defendant, who received from Boue & Co. a detail of the transactions, showing that no blame could attach on them, as they did no more than communicate the orders they received. The whole, however, terminated in the defendant's claiming from the plaintiffs, on condemnation of the ship and cargo, their prime costs with charges, giving them credit for the sums received from the insurers in America, after deducting law expenses, and debiting them with the amount of the subscriptions of those underwriters who had failed. The right to sail for Amsterdam, though blockaded, had been acknowledged by the opinion of counsel taken on the subject and communicated to the parties in the suit.

It was agreed that the grounds of the sentence of the British court of admiralty, as stated in the case of the *Columbia*, Weeks master, in 1 Rob. Adm. Rep. 154, should be used as evidence, in the same manner as a regular exemplification of the decree. If the plaintiffs were not liable for the value of the vessel, &c., then, it was admitted, the defendant would be entitled to half the amount of certain policies effected by Liotard & Co. in Amsterdam, and responsible for advances to Weeks, and other disbursements in London, while prosecuting the claim and appeal there; but, on the other hand, should they be answerable, it was conceded the policies would enure to their benefit, and the advances and disbursements be at their door.

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Riggs, for the plaintiffs, contended, that they had, under the words of the defendant's letter of the 14th of June, a general discretionary power over the whole consignment. The going to Hamburg was for the purpose of receiving directions whether vessel and cargo, or the one "or the other," should proceed to Amsterdam, and Boue & Co. were constituted by the defendant himself, his agent for carrying into effect the instructions Liotard & Co. might give. If, therefore, any inconvenience arose from the manner in which those instructions were executed, it was attributable to Boue & Co., the agents of the defendant, and the plaintiffs, consequently, not liable. To still further prove that it was the intention of the defendant to confer this general authority, his expressions in the next written letter of the 27th of June might, he said, be resorted to. The vessel is there described as "bound to" Amsterdam. The return cargo was to be purchased there, and even that modified according to the judgment of the plaintiffs, "on whose zeal for their *interest the defendant and [*231] his partner relied." In order to establish Amsterdam to be the port of ultimate destination, he read from the correspondence part of a letter from Barnewall, dated 9th July, 1798, saying, "In conjunction with our common friends, Messrs. Vos & Graves, I have loaded the brig Columbia, Weeks, with a cargo of sugar, &c., for your address, but from motives of precaution, under existing circumstances, we have ordered the vessel to touch at Hamburg for your advice, and trust it will be such as to encourage to proceed to your city." This, he argued, evinced the continuance of the intention to go into the Texel, and though it might be urged that the letter of Barnewall, begs the plaintiffs "to follow the instructions" of the defendant, yet those contained in theirs of the 30th of June had not been received when the orders to Weeks were given. It was fair, therefore, to refer to the words of Barnewall, as explanatory of the original views of the defendant, in conformity to which, the plaintiffs had directed the proceeding to

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Amsterdam. It was not till after they had done so that the qualifying epistle from the defendant came to hand. Of course its contents could not affect the present question. Instantly, however, on its receipt, the plaintiffs wrote to Boue & Co., giving fresh orders, which had in view the bringing to Amsterdam the cargo, without incurring the risk of capture, as, if that could be avoided, the sole interdiction of the defendant was in case it would not, when there, be safe from confiscation. This active behavior of the plaintiffs showed their vigilant attention to the defendant's interest; and to charge an agent of mismanagement, there must be a violation of positive, explicit orders, or a gross negligence. But in whatever light the second directions to Boue & Co. were viewed was immaterial, as the vessel had sailed under those first given; and if they were the result of an honest *bona fide* conduct, Liotard & Co. were exonerated from all consequences. What did ensue might, in fact, have been prevented had Boue & Co., the nominated agents of the defendant at Hamburgh, duly exerted themselves. They knew of the danger to which sailing for the Texel would expose, and yet refused to give the captain a written order to stay, only so long as [*282] was necessary *to consult the plaintiffs. This took away from Liotard & Co. all power of averting the accident which happened, and, as done by the agent of the defendant, to him the loss must be attributed. If to the plaintiffs, they are answerable only for prime costs and charges, not for profits. On the point of interest, he said, that in accounts with British merchants, custom had sanctioned the practice here adopted; it was the constant mode with them to charge interest on the amount of the disbursements of each year, and carry it into the balance they then struck, which sum, thus compounded, formed the principal, whereon interest was calculated for the ensuing year. Whether this was a usage to be proved and decided by the referees, or a matter of law arising from the fact of so much being due at a fixed time, was for the court to determine.

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Radcliff and *Hoffman* argued, contra, that as there was no agreement between the parties to show interest should be allowed, nor usage of trade mentioned in the case, the court must decide the naked question, whether interest were recoverable on a simple account current? If held to be so in this case, it must be so in all; and to entitle to it, there need not be either a stated or settled, but merely a rendered account. As to the plaintiffs' liability, independent of any orders, they were responsible for the amount of vessel and cargo, even under that discretionary power urged in their excuse. It appeared, from the facts detailed, that they were the general agents of the defendant. It was their duty, then, to prudently manage the shipments made to them, without any exposition to unnecessary dangers. Common reason would prohibit forwarding a consignment to a blockaded port. It was no answer to say that the one by the *Columbia* being addressed to them, was sent to a port so situated. That circumstance was not known to the defendant when the vessel sailed; the plaintiffs, however, were well acquainted with it, as appears from the letter of the 4th of August to Boue & Co., and the report of the case of the *Columbia*, in 1 Rob. Ad. Rep. 154. To enable them to guard against all unknown dangers attending the entry of the *Texel*, was the reason why the brig was sent to *Hamburgh* for orders. Nothing less than a positive direction *could justify sending a ship, or her [*232] cargo, to a blockaded port; for the egress is as hazardous as the ingress. The loading taken on board, after knowledge of the blockade, would, by the law of nations, be confiscable. The *Erderick Molke*, 1 Rob. 36, 150. *Vrouw Judith*. It was, therefore, particularly ordered by the defendant, that if *Amsterdam* was blockaded, the cargo should be sold at *Hamburgh*, and "the friends of the plaintiff dispatch her immediately." This was done to avoid the penalty of taking aboard a cargo from *Amsterdam*. After receiving this prudent direction, what is the conduct of the plaintiffs? They, as much as in them

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lies, violate their orders, and write, requesting the captain to be persuaded to attempt reaching their port by indirect means, and if he cannot be induced to that, to have his cargo forwarded to them, that they might sell and make the returns. Thus encountering the very risk the defendant meant to shun. The inference is, that the possession of the cargo of the *Columbia*, and the commissions of what she would take back, actuated the plaintiffs to measures so evidently, in all respects, opposed to their duty, and the interests of their correspondence. We contend, therefore, for their liability, not only to the amount of vessel and cargo, but for the profits which might have been made.

Benson in reply. The manner in which this account is made out, is in itself a proof that such was the custom between the plaintiffs and the defendant. It is, therefore, from the fact thus appearing, a matter of law, whether interest be due or not. Under the general discretionary authority conferred on the plaintiffs, nothing less than a fraudulent act, or that *crassa negligentia*, which amounts to fraud, would make them responsible. This flows from the nature of the bailment to the plaintiffs. Besides, their orders were only in aid of the design of the defendant, to send the *Columbia* to a blockaded port. It cannot be argued, that it was unlawful for Liotard & Co. to direct the cargo, or the vessel, to go to Amsterdam, because the case of *Vos & Graves v. The United Ins. Company*, (1 Caines' Cases in Error, vii.) has decided that, under our treaty with Great Britain, the defendant himself was warranted in sending the *Columbia* for that port, as, till [*234] warned not to enter, she had a right to make *the attempt. If the act was legal in the principal, it certainly was so in the agent. It matters little with us, therefore, what is the English law on the subject of an American's right to sail to a blockaded port; and, since the decision of *Williams v. Smith*, (2 Caines' Rep. 1,) if the obsidiary fleet be blown off, the neuter has a right to enter.

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The orders, therefore, of the plaintiffs were strictly lawful, and though an accident has occurred, yet, as it was in endeavoring to comply with directions the plaintiffs were authorized to give, and did *bona fide* communicate, no liability can attach.

SPENCER, J. The questions submitted by the case are, 1st. Whether the allowance of interest is a question of law, and if so, whether the plaintiffs are entitled to it; 2nd. Whether the defendant is liable for certain moneys paid by the plaintiffs in London, to B. Weeks, master of the brig Columbia; 3rd. Whether the defendant is entitled to one half of the amount of insurance, made by the plaintiffs on the cargo of the brig Columbia, or to what part thereof; 4th. Whether the plaintiffs are responsible for their default or mismanagement, as agents or consignees, in relation to the capture and condemnation of the said brig and cargo, so far as respects the one half thereof owned by the defendant.

The question of interest is a question of law, depending on facts. In the present case, the facts are presented in such a manner, that, without applying the law to them, I shall content myself by laying down principles, and leaving the arbitrators to make the application. For goods sold and delivered, unless there be evidence of an agreement to pay interest, none is recoverable, until a liquidation of the account takes place.[1] If an account be transmitted

[1] An account consisting of items on the part of the plaintiff, and only of credits of payments on the part of the defendant, is an unliquidated running account, which does not carry interest, without an agreement either express or implied. *Wood v. Hickok*, 2 Wen. 501.

The testimony of a witness, that it is the uniform practice of grocers to charge interest on goods sold after ninety days, unless a special agreement to the contrary is made, does not amount to proof of the usage of a particular trade, of which all dealers in that line are bound to take notice, and are presumed to be informed. *Id.*

Interest is recoverable on contracts for the payment of money, from the

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by a creditor, and acquiesced in, or assented to, by his debtor, it becomes thereby liquidated, and interest is allowable. On money advanced, interest is legally demandable.

time when the principal ought to have been paid. *Williams v. Sherman*, 7 Wen. 109.

Interest is not allowable on an unliquidated account for work, labor and services, especially where the account was not rendered before suit was brought, and where a greater sum was claimed than was allowed after a hearing by referees. *Doyle's Adm'r's v. St. James' Church*, 7 Wen. 109.

Interest cannot be charged for forwarding and commission merchants, on items of an account for freight, wharfage and storage; they are entitled to interest only on cash advances. *Trotter v. Grant*, 3 Wen. 413.

Instead of allowing interest to their customers on moneys received, it seems they may apply such moneys to the satisfaction of annual balances, unless otherwise directed, and allow interest only on the excess beyond the charges. *Id.*

The court, Sutherland, said: The referees allowed the defendant interest on all the cash paid by him from the day of payment. If there was no express direction on the part of the defendant as to the application of his payments, (and there appears to have been none,) the plaintiffs had a right, as I apprehend, to apply them, in the first instance, to such part of their account as they thought proper, and I perceive no objection, in principle, to the referees applying those payments to satisfying the annual charges, as far as they were due at the time, and allowing interest only on the excess beyond those charges, if any. The manner in which the plaintiffs kept their account, may well warrant the presumption that they intended so to apply the payment. The report must, therefore, be set aside, and referred back to the same referees, under the above directions. *Id.*

In a leading case, an account current had been rendered in 1797, containing a charge of interest, which was not objected to in the succeeding correspondence between the parties. Spencer, J., says, that for goods sold and delivered, unless there be evidence of an agreement to pay interest, none is recoverable until liquidation; that an account transmitted to a debtor, and acquiesced in, becomes liquidated, and interest is allowable; that on money advanced interest is legally demandable; and so by the usage of a particular trade. Thompson J., said, the plaintiffs had a right to charge interest on the money advanced; that the account could not be considered settled, and on that ground carrying interest that it was merely an account current between the parties; and unless some usage or practice was shown, to warrant the allowance, he should think interest ought not to be calculated, except on the money advanced. Livingston, J., said, if there be no special agreement between the parties, or usage of trade to the contrary, it ought to be allowed on all moneys advanced from their respective payments. One account is rendered as early as 1797, in which interest is calculated, and

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By the usage of a particular trade, interest may be allowed; and if it is customary to allow it to Amsterdam merchants after a specific time, and that custom is generally

yet no objection is made to it in the succeeding correspondence, from which I conclude such charge consisted with the understanding of the parties. Kent, Ch. J., said, the account exhibited is not an account liquidated, but a naked account current; and the interest is allowable only on such items in it as are for moneys advanced, except the usage of trade has provided some particular rules on the subject. *Liotard v. Graves*, 3 Cal. R. 226.

At the next term, another case was decided. It did not state any facts, but the question was submitted, whether interest could, in any case, be recovered under a count for money had and received. Kent, C. J., delivered the opinion of the court, that interest may be recovered in such an action. He says, there may be cases in which the defendant ought to refund the principal merely; but there may be other cases in which he ought, *ex æquo et bono*, to refund the principal with interest. Each case will depend upon the justice and equity arising out of its peculiar circumstances, to be disclosed at the trial. *Peace v. Barber*, 3 Cal. R. 266.

In an anonymous case, the court said the general rule is, that interest is not to be recovered on unliquidated damages, or for an uncertain demand. The question arose in an action upon a policy of insurance, and they said it was a case for the discretion of a jury. 1 J. R. 315.

So, in assumpsit for goods sold; and there were mutual accounts; but no account stated, or balance struck. The court said, there is nothing in the course of dealing between the parties from which an intent or agreement to allow interest can be inferred. It is, therefore, not a case of interest. *Newell v. Griswold*, 6 J. R. 45.

So, where the plaintiff had procured an appraisement of certain buildings under a covenant in a lease, of which the defendant had notice. The plaintiff claimed interest on the appraisement; but the court said it was not conclusive; that the value of the buildings was open for inquiry at the trial; and the damages were, therefore, unliquidated; and no interest was recoverable. *Holliday v. Marshall*, 7 J. R. 213.

The reason why the court would not give interest till rendering the accounts, was that the plaintiffs alone knew the fact that the proceeds of the wine did not reimburse the advances. *Kane v. Smith*, 12 J. R. 156.

In the case in Cowen, it may be said, that Reid alone knew he had not been reimbursed for his advances by the proceeds of the glass. He alone kept the books; but it is equally certain that the defendants knew of his advances, and they might have known the state of the accounts by inspecting the books. They often held their meetings at Reid's store, where the books were undoubtedly kept. *Reid v. Renss. Glass Factory*, 3 Cow. 393.

Although Reid had the means of ascertaining the true state of the accounts, yet he had not the sole means. The defendants were equally able to determine, by an inspection of the books, whether he had been reimbursed for his

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understood, it may be due in the present case. These observations may enable the arbitrators, on examining the facts, to decide the question of interest.

advances. The case does not inform us that any intimation was given by Reid, of a balance due to him till the 1st of January, 1819, though the factory was burnt on the 3d of May, 1815. Nor does it appear, that before the 1st of January, 1819, any step whatever was taken by the defendants to ascertain their standing with Reid. After that time, Reid alone was in fault, as he neglected to furnish an account, and none was rendered till after his death. I think, therefore, that interest is properly chargeable on the moneys advanced, from the time of such advances respectively, to the time when there was an attempt by the defendants to liquidate and settle the account. *Id.*

Interest is not allowable on an unliquidated account for goods sold and delivered, where no time is fixed for payment, and there is no agreement to allow interest express or implied. *Zucker v. Ives*, 6 Cow. 193.

A merchant or manufacturer whose uniform custom it is, after a limited period of credit, to charge interest upon articles sold or manufactured by him, may charge interest accordingly to those who are in the habit of dealing with him with a knowledge of such custom. *Reab v. M'Alister*, 8 Wen. 109.

Here the custom was proved; and although, as a general principle, running accounts do not draw interest, yet, if a merchant has been in the general practice of charging interest after a limited time, those who deal with him with a knowledge of that fact, are bound to pay interest at the expiration of that period of credit; and their liability is the same if they have been in the habit of settling their accounts with him, in which such interest has been charged and allowed. *Id.*

The plaintiff proved that the defendant was one of his customers, and that he always charged interest on his accounts after ninety days. The uniform custom of a merchant is presumed to be known to those who deal with him; and are supposed to act with reference to that custom. *Id.*

An account consisting of items on the part of the plaintiff, and only of credits of payments on the part of the defendant, is an unliquidated running account, which does not carry interest without an agreement either express or implied. *Wood v. Hickok*, 2 Wen. 501.

The testimony of a witness that it is the uniform practice of grocers to charge interest on goods sold, after ninety days, unless a special agreement to the contrary is made, does not amount to proof of the usage of a particular trade, of which all dealers in that line are bound to take notice, and are presumed to be informed. *Id.*

It seems, that if the custom of a merchant to charge interest after ninety days is known by those who deal with him, or if the length of credit is stated in an account rendered at the sale, an agreement to pay interest may be implied. *Id.*

In that case, which was an action for goods sold and delivered by the

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*The second question I understand to be substantially this: Whether the charges in England in prosecuting the claim for a restitution of the brig and [*235]

plaintiffs, who were wholesale grocers in Albany; and the account was for sundry purchases made by the defendants of the plaintiff between Feb. 1824, and Nov. 1825, amounting to \$1190 62; and the payments made by the defendants amounted in June, 1827, to \$1190 62. The plaintiffs charged \$64 87 as interest; but the jury certified a balance in favor of the defendants of \$3-100. *Id.*

The judge charged the jury that this was an unliquidated running account between merchants, on which the plaintiffs were not entitled to interest, unless there was an agreement between the parties that interest should be charged after a particular time, or knowledge brought home to the defendants of the usage of the plaintiffs, from which an agreement might be inferred as by the statement and settlement of an account. He submitted to them to determine whether the defendant ought to be precluded by his examination of the account containing the charge of interest. *Id.*

Upon a motion to set aside the verdict for the misdirection of the judge, the motion for a new trial was denied. The court, Sutherland, J., saying, "The only ground on which it could be contended that the action was liquidated and closed was, that the account had been sent to the defendants, and they had not objected to it. In the first place, there was no direct evidence that they ever received it; but admitting that they did, the subsequent conduct of the plaintiffs, as well as the defendants, shows that neither party considered the account as closed or settled by the assent of the defendants. The defendants subsequently entered into an examination of it, and a material and an important item was agreed to be struck out or materially reduced in amount. *Id.*

Where the advances made by the plaintiffs were not in money, but in cargoes; that is, in merchandize. The defendant furnished a cargo of wine, which the plaintiffs' ship took to the East Indies, under a special agreement as to the manner in which the proceeds should be disposed of. One part of the agreement was, that the plaintiffs should be reimbursed out of the nett proceeds of the wines, for their advances; and for the surplus of such proceeds, to furnish cargoes to the defendants, or bills on London, allowing interest from the time of the sale in India on the overplus; and should the wines not nett sufficient to pay the advances, the defendants were to make up the deficiency. Here, then, was a special agreement, on the part of the plaintiffs, to pay interest on the overplus, if the wines should produce more than their advances; but if they should produce less, the defendants were to make up the deficiency. Nothing was said about interest, from which the inference is very strong, that it was the understanding of the parties that they were not to pay interest. It was therefore properly disallowed to the plaintiffs, either upon the ground that it was an unliquidated account, in re-

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her cargo, are to fall on the plaintiffs or the defendants? This is dependent on the fourth question. For, if the plaintiffs have rendered themselves liable for the capture, then they ought to bear the expenses as an item of damage; otherwise not.

The third question, too, rests on the same result. The goods were acknowledgedly insured by the plaintiffs, for the concerned in that brig. If the plaintiffs are not answerable to the defendant for the whole amount of the property, on the ground of mismanagement, then the defendant becomes entitled to the one half of what has been recovered from the underwriters in Holland, with an allowance to the plaintiffs for their commissions.

The fourth point embraces the great object of the controversy.

If the position laid down by Sir William Scott, in

action to goods, wares and merchandises, or upon the ground of the special agreement. *Kane v. Smith*, 12 J. R. 156.

Sutherland, J., says, "No interest shall be allowed upon an unliquidated account for goods, wares and merchandize, without an agreement to allow it either expressed or implied; because the balance of the account only constitutes the debt, and, until that is ascertained, there is, strictly speaking, no debt due. This appears from the manner in which an account may be proved. It is not necessary to show the delivery of each article; but proof that some were delivered; and that the plaintiff keeps honest and fair books of account, &c., is evidence of the delivery of all the articles charged in the book. Thus, the whole account is considered as one transaction. *Raid v. Mansseler Glass Factory*, 8 Cow. 425.

Interest is not allowable on any unliquidated account, for work, labor and services, especially where the account was rendered before suit brought, and where a greater sum was claimed than was allowed after a hearing by referees. *Doyle's administrators v. St. James' Church*, 7 Wen. 118.

Where the agreement was to pay for materials furnished, upon the performance of the contract on the part of the plaintiff; held, that the plaintiff was entitled to interest, at least from the commencement of the suit, which was a legal demand of payment. *Foster v. Heath*, 11 Wen. 477.

In assessing damages for the breach of a contract, the jury may allow interest by way of damages. *Dow v. Dey*, 8 Wen. 356.

Where there has been no liquidation of an account; and no evidence of an agreement, expressed or implied, to pay interest, interest is not allowable, *Tucker v. Ives*, 6 Cow. 193.

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condemning this vessel and her cargo, were to be regarded as law here, I should consider the plaintiffs liable for the injury sustained by the defendant, because they directed the captain, who was consigned to them and bound to obey their orders, to do an act imminently endangering the property intrusted to their management, and this, obviously contrary to the defendant's intention, manifested by his sending the vessel to Hamburgh, a neutral port, to await orders, and be governed by circumstances, rather than to Amsterdam, a port of one of the belligerents. There would have existed a want of skill, or actual infidelity to the interests of the principal, amounting to gross negligence or fraud, in either of which cases, a liability to the constituent would be created.

The judge I have mentioned, considered (1 Rob. Ad. Rep. 156,) that the sailing from Cruzhaven with an intention of evading the blockade of the Texel, was a beginning to execute that intention, therefore, an overt act constituting the offence, and that, from that moment, "the blockade was fraudulently invaded."

The court for the correction of errors, in a question between the now defendant and Graves, and the United Insurance *Company, held the insurers [*336] liable for the capture and condemnation of the same vessel, and decided, that the brig Columbia, having only an intention of entering the Texel if the investing squadron should be blown off, and having been captured before she arrived at the mouth of the river, and had attempted to enter, was not liable to condemnation; on the principle that intention is not a ground of judicial animadversion, and that nothing short of an actual attempt would warrant a forfeiture.

I hold myself bound by the latter decision; it then necessarily follows, that the sailing of the Columbia from Cruzhaven, with an intention to enter the Texel, was an innocent act, and if it was, the plaintiffs cannot be considered as responsible for an injury in the prosecution of

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such act. I cannot proceed on any speculative reasoning as to what might have happened in consequence, of the plaintiffs' orders, had not the vessel been captured as she was. The gravamen is this seizure and condemnation, which has been pronounced in the last resort as illegal and unjust. It manifestly appears by the case, that the plaintiffs acted in good faith, and under an idea that the Columbia, having sailed before the blockade was known, was entitled to notice, and to be turned away. They also conceived that if the investingsquadron was blown off, she might lawfully enter; they cannot, therefore, on any principle, be liable to this claim.

THOMPSON, J. This cause, involving the examination of long accounts between the parties, has been referred to referees; but as the result, with respect to some of the items, depends on questions of law, those questions are submitted to the determination of this court, that the examination of the referees may be regulated thereby.

The principal question relates to the conduct of the plaintiffs as agents for the defendant, respecting the brig Columbia and her cargo, of which the defendant is to be considered as owner.

Under the circumstances of the case, it is made a question, whether the consignees acted with that reasonable caution and prudence which they ought to have [*237] done. It is not pretended but that they knew of the blockade, and they might have been chargeable with gross abuse of their trust, if there had not been reasonable grounds to calculate that the vessel might have entered, notwithstanding the blockade. They knew that had been the case with respect to other American vessels, and from the state of the winds, they expected the blockading squadron might be drove off the coast, so that no blockade, in fact, would exist, so as to expose the vessel to capture and condemnation, within the rules adopted by our courts, until she had proceeded so far as to find an ac-

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tual, existing blockade. The consignees knew the vessel was bound to Amsterdam, the cargo intended for that place, and insurance made to that port. Under such circumstances, I cannot think the plaintiffs chargeable with gross inattention to the interest of their principals.

The subsequent orders, contained in the letter of the 30th of June, cannot affect the question, not having been received at Amsterdam until the 20th of August, which was the very day the brig was captured, as appears by Robinson's report of the case. Had this letter arrived in due season, it would have been the duty of the agents, at all events, to have stopped the vessel, and unloaded her at Hamburgh. The orders are positive to unload there, if Amsterdam should be blockaded. This letter also contains the first information the plaintiffs had, that permission was given, by the policy, to touch at Hamburgh. The next day after the receipt of this letter, containing what they deem a modification of their orders, they wrote Boue & Co. countermanding those previously given, and directing them not to send the brig to Amsterdam, unless she could come through the Wadden, where, it appears, she would have been out of the reach of any British armed vessels. But this letter arrived too late, for Captain Weeks had actually sailed, and was captured before this time. The plaintiffs are not chargeable with want of due diligence, in countermanding their first orders given to Boue & Co. It was done the very next day after receiving instructions from their principals which made it proper so to do. The letter of the 30th of June, then, and all subsequent correspondence, ought to be put out of view, and the whole merits *of the question will depend on the instructions contained in the letter of the 3d of June, and the orders given by the plaintiffs to Boue and Co. in consequence thereof, on the 4th of August. I consider the plaintiffs, therefore, as agents vested with general and discretionary powers, and, as such cannot be said to have violated their orders. If made liable at all, it must be

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either for gross negligence, or fraudulent conduct. I see nothing whereby to charge them on the latter ground ; and, if they, rather unadvisedly, ordered the vessel to Amsterdam, when it was blockaded, it would not, under all the circumstances, be deemed anything worse than an error of judgment.

I think, therefore, that the plaintiffs are not chargeable with the loss of the vessel and cargo ; and they acting in the capacity of agents in the advances made to Captain Weeks, the defendant is bound to reimburse them. There can be no doubt but that the defendant is entitled to the benefit of the insurance made in Amsterdam upon the cargo in question. With respect to interest on the plaintiffs' account it appears to me they had a right to charge it on the money advanced. The account cannot be considered as settled, and on that ground carrying interest. It is merely an account current between the parties, and unless some usage or practice is shown, to warrant the allowance, I should think interest ought not to be calculated, except on the money advanced.

LIVINGSTON, J. This is a case of importance, and has been argued with much ability and zeal. The question of greatest difficulty is that which regards the plaintiffs liability. An agent, who acts under positive orders, must, at his peril peruse them literally. It is not less evident, that a factor, who is not particularly instructed, but in whom a discretion is vested, is entitled to protection, so long as he acts according to the best of his judgment, and is innocent of fraud and gross abuse of the confidence placed in him. If a loss ensue from mistake or error of judgment, where there is no *lata culpa* or *crassa negligentia*, his principal, and not he, must bear it ; were it otherwise, no prudent man would accept a trust of the kind ; and a merchant, however distant from the scene of action, would

[*239] *be obliged at a great hazard, to give positive directions, instead of reposing on the intelligence of

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a correspondent, who might take advantage of circumstances which were neither contemplated nor foreseen by himself. The same rule must govern where language, equivocal or doubtful, be used; for nothing can be more absurd or unjust, than that a man, whom an accident befalls, in consequence of a loose or ambiguous phraseology, should resort to an agent for indemnification, when, by a moderate portion of care, he might have rendered himself intelligible, and prevented a loss.

The defendant's letter of the 14th of June, 1798, provided only against an "open rupture between Holland, France, and the United States." It did not embrace the case of a blockade, and was explicit or silent on every other point. In what respect, then, were the plaintiffs' orders of the 4th of August, which arose out of this letter, and which, as is alleged, occasioned the disaster, a violation of any instruction which it contained? No other meaning can be extracted from it, than that the plaintiffs, if the vessel touched at Hamburgh, were to order her to Amsterdam, if peace continued between the Batavia republic and this country. If they had had a right to direct her to stop at Hamburgh, in case of blockade, which may admit of doubt, they were sole judges, being uninstructed on this point, of the degree of danger which would render such measure proper. If they had undertaken to arrest the *Columbia* in her voyage, but in the event of a war, and a loss had followed, might they not have been called on for their authority, and found it difficult to defend their conduct? But admitting that, as general agents, if such they were, they had this right, they were not bound to exert it, unless, in their opinion, the defendant's interest, would be promoted by the adventure's terminating at Hamburgh. The reason they assign for a different conduct, would probably have influenced the defendant himself. They were encouraged to this step, because several other American vessels had arrived; and they might have supposed, as it appears they did by one of their letters to Boae & Co.,

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that the worst that could happen from the block-
[*240] ade was the Columbia's being sent *away for an attempt to enter, and a small delay in her return to Hamburgh. That the British had no right to capture, without a previous warning, has been settled by our court for the correction of errors in action against the assurers of this very vessel, who contended that their responsibility was at an end by this breach of blockade. Sir William Scott had condemned the Columbia, although she had not been turned away, deeming such ceremony unnecessary, where the merchant or his agents had acquired notice in fact, even during the voyage, of an existing blockade. On the ground, however, of this judgment (which was not regarded as conclusive between the assured and the assurer) being contrary to treaty, it was determined that sailing for a blockaded port, with knowledge of the fact, was no waiver of the right of being notified, and once turned away. When at the bar I had occasion to examine the grounds of this sentence, and, although no one holds in higher estimation the talents and integrity of the eminent character that pronounced it, my conviction has ever been that it was not warranted by the treaty of London, or the law of nations. Admitting the blockade known in America, it did not follow that sailing for Amsterdam indicated an intention to break it. It might be raised before the Columbia arrived in the Texel, or if not, the master might be instructed to go elsewhere. If such intention existed, why shall mere intent in this case, more than in any other, amount, as Sir William terms it, "to an overt act constituting the offense?" As well might a design to poison be called an overt act of murder. But when it be recollected that the owners were ignorant of the blockade, and their intentions of course innocent, this confiscation cannot but be viewed as a very heavy penalty for the mistake of a master or agent. Nor did the notice received in the Elbe justify the proceeding; for, the investment of Amsterdam not being known in New-York when the vessel sailed, it

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was a case within the letter of the treaty. She might proceed, notwithstanding any intelligence obtained on the way, which might be incorrect, until warned away by one of the blockading squadron, and *noth- [*241] ing short of a second attempt should have been deemed a violation of the belligerent rights.

As this judgment is made part of the case with a view to the plaintiff's prejudice, these remarks on it will not be thought impertinent, especially if they assist in forming a proper estimate of the risk of a voyage from Hamburg to Amsterdam, or tend to show that, in giving the orders in question, they did nothing illegal, or which justly exposed the property to forfeiture. This must have been their understanding at the time, and probably the same opinion prevailed in Amsterdam, or insurance would not have been effected there at so moderate a premium. This ground, too, was taken by the defendant and his partners in the actions, which were brought to recover the insurance on this voyage, and they ought not now to be permitted to abandon it.

Some stress was laid on the letter of the 30th of June, 1798, which contains a direction to unload at Hamburg, "if a blockade actually existed;" But not being received until after all the mischief had happened, by what rule of right is the plaintiffs' conduct to be judged by it? Does it not rather prove that the owners of the Columbia thought that a positive instruction on this point necessary to justify the plaintiffs in adopting this measure?

But admitting a discretion in the plaintiffs, it is contended they acted wantonly, or with gross inattention to the owner's interest, and that they had nothing in view but their own advantage, being determined, at all hazards, to obtain possession of the property. In support of this allegation we are referred to their letter of the 25th of August, to Boue & Co., directing the cargo to be sent on through the Wadden, contrary to their instructions, which were to sell it at Hamburg. If, in consequence of this letter, a

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loss had occurred, the plaintiffs would have been responsible; but that not being the case, and as it might, for aught that appears, have been greatly for the defendant's benefit to have the cargo sent on to Amsterdam by the interior navigation, and one in return provided there, (for we are in the dark as to the then state of the markets at Amsterdam

and Hamburg,) we cannot say this step was [*242] not intended for the defendant's benefit. It can

hardly be supposed that a respectable house, for the paltry consideration of a commission, would sacrifice, or expose to unnecessary perils, the property of their principals. Nor will it be charitable, from an act doubtful at most, to draw in question the integrity of their conduct prior to this time, particularly when we perceive with what alacrity their orders were countermanded on receipt of the second letter. It was also stated, as further evidence of the plaintiffs' misconduct, that if the Columbia had succeeded in reaching Amsterdam, she would have been good prize if captured in coming out. But if she had a right to go in, as I think she had, unless warned away, and she received no such intimation from the surrounding squadron, it is by no means clear that the British could rightfully have prevented her egress. Being, then, of opinion that no liability has been incurred, it is unnecessary to settle a rule of damage, or to inquire how far the subsequent conduct of the defendant and his partners amounted to a confirmation of the acts of their agents. On the latter point, however, it may be remarked, that they did not discover that early disapprobation which agents, who have mistaken or exceeded their instructions, have a right to expect. A merchant should not be permitted to conceal his dissatisfaction, and thus retain the power of taking advantage of events. On the 27th of October, 1798, when the blockade of the Texel, as well as the order now complained of, were known, Mr. Barnewell, in a letter addressed to the plaintiffs, expresses a "hope that they have received the cargo," without intimating the smallest dissatisfaction at their conduct, or any

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apprehensions on account of the blockade. It is not until six months after this last letter, and as many as ten after the capture, and not until the Columbia's fate was known, that the concern complain of the plaintiffs, without even then giving any explicit intimation that they will be regarded as answerable for consequences. On the same day they write at some length to their correspondent in London, and, although they review the conduct of all the parties in this transaction, they throw no blame on the plaintiffs; but, on the contrary, attribute the misfortune to the captain who refused to wait eight days in "the Elbe, " within which time," say they, "positive [*248] instructions arrived from Holland to unload at Hamburg." They also approve of the appeal, and beg to be made acquainted with the progress and probable amount of charges. The underwriters, too, are sued on their own account, and without consultation with the plaintiffs. From this conduct the inference is fair, that if the parties did not approve of the plaintiffs' proceedings, they did not think themselves entitled to look to them for an indemnity. They would otherwise have preferred an immediate recourse of that kind to a tedious and expensive litigation in the British admiralty, or to the very uncertain issue of a controversy with the underwriters here.

With respect to the question of interest. If there be no special agreement between the parties, or usage of trade between Amsterdam and New-York to the contrary, it ought to be allowed on all moneys advanced from their respective payments, and on the goods supplied, after such time as is conformable to the course of trade between the two countries. One account was rendered as early as in 1797, in which interest is calculated, and yet no objection was made to it in the succeeding correspondence, from which I conclude, such charge consisted with the understanding of the parties.

Upon the whole, my opinion is, that under the letter of the 14th of June, which was silent as to the case of block-

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ade, the plaintiffs had a discretion to act in such an event as in their judgment they thought best for their employers' interest. That if they acted fairly, and under a sincere belief, as I think they did, for there is no evidence to the contrary, that the Columbia would probably reach Amsterdam in safety, or only be sent away and return to Hamburgh, they are not answerable for her unjust condemnation, nor for any damages in consequence of their conduct in the premises; that they are entitled to interest as charged, unless it shall appear to the arbitrators to be contrary to agreement, or to the known and established custom of merchants in Amsterdam, trading with this country. That the moneys advanced to Captain Weeks, not appearing to be extravagant, or to have been expended for his own use,

form a proper item against the defendant, who in [*244] turn is entitled *to a credit for one half of what has been received by the plaintiffs from the insurance effected in Amsterdam on the cargo of the Columbia, with interest thereon from the time of payment.

KENT, Ch. J. The principal question of law arising in this case is, whether the plaintiffs are responsible, in the character of agents or consignees, for default or mismanagement in ordering the brig Columbia and her cargo from Hamburgh to Amsterdam.

It is unnecessary to examine the value of correspondence between the parties annexed to the case, because the whole question turns upon the orders of the 4th of August, as founded upon the instructions of the 14th of June. No others had reached the plaintiffs on the 4th of August. The subsequent letters are no further material than as an exposition of the original intentions of the parties. From them it appears, beyond all doubt, that Amsterdam was the ultimate and original port of destination, and that touching at Hamburgh was only intended as a precaution, to await the advice of the plaintiffs. As they were left in the first instance, and until after the 4th of August, with unqualified abso-

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lute discretion, they were only bound to act with good faith, and with diligence, as they should judge most conducive to the interests and expectations of their principals. An agent with general discretion is no further holden. 1 Beawes, 8vo. edit. 44; Jones on Bailment, 75; 2 Ld. Raym. 918. Under the circumstances attending the order of the 4th of August, I do not consider it an abuse of trust for which the plaintiffs are responsible. They knew the destination of the vessel and cargo, and that, in every event, they were to give orders to Boue & Co. They assert, and we are to take it to be the fact, that American vessels had lately entered without hindrance, and we perceive from the case, that the opinions of counsel here were, that the vessel had a right to make the attempt, and could only be turned away, under our treaty with Britain, for making the first attempt. The plaintiffs gave their orders with a qualification, that "if the winds should continue variable, which naturally drove the English off the coast:" they may not have acted with great wisdom or prudence, but if they gave their orders with *honesty, and, [*245] as they thought, for the interest of their principals, they are excused, and the defendant has only to blame himself for giving an indefinite discretion.

The determination of this question puts an end to two other points that were raised upon the argument. The insurance effected by the plaintiffs in Holland, was for the account of Vos & Graves; the defendant is entitled, as of course, to credit for one half of the amount of that insurance, and is liable to the charges for moneys paid to Captain Weeks in London.

The only remaining question is, as to the legality of the charge of interest in the plaintiffs' account. The account exhibited is not an account liquidated, but a naked account current, and interest is allowable only on such items in it as are made for moneys advanced, except the usage of the trade has provided some particular rules on the subject, and which are to be submitted to the referees to determine.

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TOMPKINS, J. I concur in the results of the opinions given, and to detail my own reasons would be only to repeat what my brethren have said.

TOM *against* SMITH.

Profits are insurable *eo nomine*. If profits only be insured, an abandonment is necessary when there has been no insurance on the cargo, and in such case it must be made early, that the insurer may elect either to pay only his loss, or to pay that and the price of the goods, at first cost and charges; therefore, if the assured lie by, and take his goods and sell them, he cannot afterwards call on the underwriter for any loss on the profits. But whether this rule will apply between different sets of underwriters on cargo and profits, *quæra*.

ASSUMPSIT upon a policy of insurance on the profits of the cargo of the Mary, from Batavia to New-York, valued at six thousand dollars.

In the prosecution of the voyage insured, the vessel experienced such violent weather, as to be under the necessity of bearing away for St. Christophers, where, after a regular survey, under a warrant from the admiralty, she was found to be irreparable, so as to carry on her lading, except at an expense of more than half her value. In consequence of this, as the revenue laws of the island forbade shipping the cargo in any other bottom, it was sold at much about the same price it would have yielded in New-York, and produced, on the amount of the sales, a considerable profit. Without being informed of this latter circumstance, the plaintiff, on receiving advice of the being obliged to make for the port of necessity, communicated it to the underwriters; and on the 5th April, 1799, offered [*246] to cancel the policy. The proposition was accepted by some, but refused by the defendant. In the June following the Mary arrived, bringing with her bills of exchange for a part of the property sold, and the residue in rum and molasses, in which it had been invested

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by the plaintiff's agent, who was also part owner of ship and cargo. On arrival, the rum and molasses were taken by the underwritten and disposed of, but produced considerable less than they cost. The bills of exchange were not more fortunate; for several of them, after being returned and renewed, were finally unpaid, and on the whole a loss was ultimately sustained.

In the latter end of November, 1800, the plaintiff, in consequence of a decision of this court, on an insurance of profits on the same voyage, claimed for a total loss; and, on the 6th of August, 1802, made a formal abandonment in writing.

Interest, inability to proceed with the original lading, and subscription being admitted, the plaintiff, to substantiate his demand, adduced an account of profit and loss on the cargo of the ship *Mary*, in which the net amount of the cargo sold at St. Christophers, after deducting commissions, freight, insurance, and all other charges, was credited, and the loss of the bills of exchange and produce received in payment, were debited.

Upon the above facts and statement, a verdict was taken for the plaintiff for 657 dollars and 50 cents, being the amount of the defendant's right, with interest, from 30 days after the 5th of April, 1799, subject to the opinion of the court, whether the total loss and interest, from the above period, could be recovered; or whether the interest ought to commence only from the date of the abandonment; or whether judgment ought to be for the defendant. The entry to be modified accordingly, and either party to be at liberty to turn the case into a special verdict.

T. L. Ogden, for the plaintiff. We contend, 1. That the voyage as to goods having been defeated, we are entitled to recover as for a total loss of the profits; 2. That in an insurance on profits, no abandonment is necessary; 3. That if necessary, the abandonment is good, as, when it was made, the loss continued total; 4. That interest *is [*247]

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due from the expiration of 30 days after the notice of loss given to the underwriters.

The recovery depends on the arrival of the goods; for if they reach their port of destination, though they come to a losing market, the underwriter is exonerated. It is admitted the voyage was defeated, from the irreparability of the vessel. If so, the right to recover attached. The question, then, arises, whether an abandonment was necessary. On this point the nature of the policy will serve to guide. An insurance on profits is a kind of heterogeneous contract, participating in the qualities of a wager, and of an interest policy. Of a wager, because at the time of subscription there is no interest existing; of an interest, because there is a contingency on which it will arise, and these future possibilities the law permits to be insured. Some of the rules which govern on wager policies, are equally applicable to those on profits. There can be no average loss, nor can there be an abandonment, because the profits are inseparable from the goods. When they are insured, they, on abandonment, go the underwriter on them, who runs the risk of losing by their sale, and, therefore, has a right to retain what may be gained. This shows the necessity of making the arrival the criterion of the right to recover. It is admitted that the goods did not arrive, in consequence of the inability of the ship to perform her voyage; it follows, therefore, that a total loss accrued; and, though it was but technically so, still an abandonment could not be necessary, because it could give no control over the goods, and conveyed no property or interest in them. To abandon, therefore, was perfectly nugatory. If a loss continue total to the time of action brought, in no case is an abandonment necessary to entitle to recover the full amount of the insurance. *Earle v. Shaw*, April, 1800. See 2 Caines' Rep. 208. If it be not total, then, indeed, indemnity for a partial injury is all that can be demanded. To ascertain whether the loss be total or partial, we must look to the

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final result.(a) If that be done here, it will be seen that the goods not only never arrived, but that an actual loss on the sales has been sustained. This is established by the account which was exhibited. The only question, then, will be, from what period ought interest to be calculated? *As abandonment was needless, the [*248] right to compensation arose on the expiration of 30 days after demand; the verdict, therefore, is correct, and ought to stand.

Pendleton and *Harison*, contra. By the decision of *Abbott v. Sebor*, this court settled that an insurance on profits was an interest policy. Such it must be, because in England insurances of this sort are permitted. *Le Gras v. Hughes*, Marsh. 84. *Grant v. Parkinson*, ib. 111. If so, an abandonment was necessary; for, whenever the property remains in specie, it exists, unless in the hands of a captor, in the nature of salvage, and must, therefore, as a valuable interest, be relinquished to the underwriter. Without denying the doctrine of *Earle v. Shaw*, we say it does not apply, because the assured here has meddled with and assumed a disposition of the property. This case, then, is exactly within the principle of *Mitchell v. Edie*, 1 D. & E. 608, and *Allwood v. Henkle*, Park, 172. The plaintiff has traded on the subject of insurance. After remitting, renewing, and receiving damages on some of the bills, he comes on the underwriter for a total loss, because a part of them have proved bad. We contend this policy is on the incident, and that the plaintiff takes to it, by choosing to retain the principal. The court cannot tolerate the idea, that after an insurance on profits, *eo nomine*, the assured shall, at the port of necessity, receive them, and after managing them in his own way, demand a total loss, because they ultimately turn out deficient. If the determination is to be regulated by the rules which govern wager

(a) See *Church v. Bedient*, and *Hallett v. Peyton*, 1 Caines' Cases in Error, 21—43.

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policies, there cannot be a recovery, as the vessel did arrive. It is no answer to say the policy was on profits. In *Kulen Kemp v. Vigne*, 1 D. & E. 304, the assurance was on the cargo; but as the ship did arrive, the court held the underwriter would, allowing it a wager policy, have been exonerated.

Hoffman, in reply. In *Kemp v. Vigne*, the insurance was expressly on the arrival of the ship, not of the goods. On the point of abandonment, it is sufficient to observe, that when a demand was made for a total loss, the insurer had it in his power to make it equivalent to abandoning, by paying his subscription. It is a mistake to say the profits have been diminished by trading on them. [*249] The *actual proceeds of the cargo sold, that which was given for it, has been realized, and credited to the underwriter. Upon this principle, even, there is a total loss. Therefore, whether the making a profit, or the arrival of the goods, is to be the criterion, there must be a recovery, for neither one nor the other has happened.

LIVINGSTON, J., delivered the opinion of the court. It is not made a question whether profits are an insurable interest. Whatever objections lie to the practice, we have heretofore considered them as such, and the counsel of both parties have reasoned on that supposition. In France, nothing but ship and cargo are regarded as proper objects of insurance. In England, and in this country, it is not unusual to insure profits, *eo nomine*, and yet no decisions are to be found on the construction or effect of such policies. We are at liberty, then, to adopt such rules, not inconsistent with the written contract, as shall render them as little as possible of the gambling kind. Under no pretext indeed can they be called wagering policies, which exclude all idea of interest in the assured. It would be hard, therefore, on the underwriter, to rank them in this class, and thus deprive him of the benefit of salvage. —A

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premium on profits is not greater than on goods, and yet it certainly ought to be much higher, if a total loss may be demanded, without any part of the profits, however considerable, going to the underwriters. It is more equitable to consider these insurances as a species of valued policies on cargo, which they are in substance, although not in form. It is surprising, that in a country where merchants may insure their adventures at almost any value, this practice should ever have been introduced. The more the subjects of insurance on any one voyage are multiplied, the more confusion and embarrassment will, in cases of disaster, be experienced. It will often perplex the most skilful broker so to adjust a loss, as to do justice to the different classes of underwriters. We are disposed, therefore, to regard these insurances as another way of valuing the goods, and that in total losses like the present, the underwriter has such an interest in the property, as to be entitled to an abandonment.(a)[1] What would be the

(a) But though the assured abandon first to the underwriter on the goods, he may recover as for a total loss on the profits subsequently abandoned to the insurer on them, where the vessel from capture, though restored, never arrives at her destined port. *Mumford v. Hallett*, 1 Johns. Rep. 433.

It seems, that even an arrival of the goods at the destined port will not prevent a recovery, if there has been a technical total loss, and the goods be sent on by the underwriters in different ships, for the policy is on the profits by the ship in which laden. *Henrickson v. Margetson*, 2 East, 549, n. (a.) Whether the recovery will always be total, is, perhaps, doubtful, though in *Mumford v. Hallett*, *ubi sup.*, it is said a policy on profits must necessarily be valued, for in *Hodgson v. Glover*, 6 East, 316, where only a part of the goods were lost, but a portion arrived and were sold, a recovery was denied because the plaintiff did not show, that had not the goods been lost, there would have been a profit, and that there was a loss of profit on the whole adventure, notwithstanding the safe arrival of a part. Had these facts been made to appear, it may, perhaps, be gathered from the case that the policy would have been opened.

[1] Goods are insured in one policy, and the profits in a separate policy, and the insured recovers for an average loss on the goods; he can only recover an average loss, in the like proportion, on the profits. *Loomis v. Shaw*, 2 J. C. 36.

A loss on a policy on profits will be a total or partial loss, according as

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[*250] effect of abandonments to the respective underwriters of cargo and profit, we will not undertake to say. Perhaps, on tendering an indemnity, the former might be obliged to cede their interest to the others, or to account with them for the profits, but here being no abandonment of the cargo, this difficulty is not before us. We are only to determine whether, as between the owner of cargo, and his insurer of profits, it is reasonable to permit the former to manage the property as he pleases, and at a period ever so distant to call on the latter for a total loss. If abandonment be necessary, as we think it is, the one on which the plaintiff relies was not in time. So far from giving any intimation of such design, he takes back the premium from several underwriters, and as to them cancels the policy. He then proceeds by his agent to sell the cargo, takes bills in payment on which there is a loss, and

the loss on the subject matter of the profits is total or partial. *Abbot v. Sebor*, 3 J. C. 39.

It seems, that the rule by which to ascertain whether there is a total or partial loss of the profits is, to determine whether more or less than one-half in value of the subject has been lost. *Id.*

Profits are an insurable interest. *Tom v. Smith*, 3 Cal. R. 245.

In France, nothing but ship and cargo are regarded as proper objects of insurance. *Id.*

In England, and in this country, it is not unusual to insure profits *eo nomine*, and yet no decisions are to be found on the construction or effect of such policies. *Id.*

We are at liberty, then, to adopt such rules, not inconsistent with the written contract, as shall render them as little as possible of the gambling kind. *Id.*

Under no pretext, indeed, can they be called wagering policies, which exclude all idea of interest in the assured. *Id.*

Such an insurance is but another way of valuing the goods, and in a total loss, the underwriter has such an interest in the property, as to be entitled to an abandonment. *Id.*

But though the person insured abandon first to the underwriters on the goods he may recover as for a total loss on the profits which he subsequently abandoned to the insurer on the profits, in a case of capture, where the vessel never arrives at her destined port. *Mumford v. Hallett*, 1 J. R. 433 3 N. Y. Dig., p. 103.

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finding he has not made out to his wish, calls on the defendant for the whole amount of his subscription. This case does not fall within the reason of those in which it has been settled, that an abandonment is never too late while the loss continues total. Perhaps it would have been better, in all cases, to drive the assured to an early election, whether he will abandon or not, and not leave it in his power, as it now is, to run the underwriter to an immense expense, in attempts to recover the property for his own benefit, and then throw it upon him, when he can no longer take any one step that may be of advantage; but in opposition to the positive regulations or practice of most maritime countries, and of England among others, where abandonments must be made within a reasonable time after notice of loss, we permit the assured to lay by for years, in case of a capture or other technical total loss, provided the capture or other accident continues. In these cases, however, the property is out of the hands of the assured, who is pursuing measures to recover it; but it is different here, where the loss, properly speaking, was never total. The cargo was not, as in case of capture, taken from the owner. On the contrary, he chooses to treat the loss as partial; he directs a sale of it on his own account; and finally abandons, but not until after a lapse of three years, when in *fact there is nothing to surrender, [*251] but what he has already received, and means to retain. Whatever might have been the claim of the defendant on the insurers of the cargo, if an abandonment had been made to them, (on which our opinion is reserved,) we think, as between him and the owner, he had a right to pay the first cost of the goods, with all the charges and profits according to valuation, and on those terms to insist on an assignment. To enable him to assert this right, there ought to have been a seasonable abandonment, which, notwithstanding the decision just referred to, should always be made as soon as possible, where the disaster, as was the case here, is of such nature as not to devalue the assured

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of his property. This is a case of some novelty, on which precedents throw little, if any light. It is very probable, therefore, that our view of it may be incorrect, but after mature reflection, we cannot come to any other result, satisfactory to our own minds. If wrong, the precedent will not work much mischief, for it cannot be long before underwriters, in this state at least, discover the folly of insuring, unless at a very advanced premium, either profits or freight. The latter, it has already been determined, or at least so much as is earned, "even during the voyage insured," after abandonment of the ship, goes to her underwriters, and if profits on goods, in like cases, should be adjudged to belong to the assurer of that subject, there would be none, or very little salvage in either case, so that while the underwriters on ship and cargo would be receiving enough, and perhaps more than enough, to reimburse them, those on profits and freight may pay a total loss on the same voyage, and not receive a farthing from the subjects insured. Our opinion is, that the defendants have judgment.

END OF AUGUST TERM.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW YORK.

IN NOVEMBER TERM, IN THE THIRTIETH YEAR OF OUR INDEPENDENCE.

WEED *against* ELLIS

The guardian of an infant may submit to arbitrators on behalf of his ward, and a performance will be a bar to a suit by the infant, when of age, for the same matter.

DEBT on an arbitration bond entered into with the plaintiff, by which he, as guardian of Eber Weed, submitted to three indifferent persons all things relating to a suit brought by him, in the same capacity, against the defendant for assaulting and falsely imprisoning the said Eber Weed. Plea, *nul agard*; to which the plaintiff replied, setting forth an award, reciting that they, the arbitrators, being "named by and between Eber Weed, by his guardian, Noah Weed, of, &c., and Caleb Ellis of, &c., did award that Caleb Ellis should pay to Noah Weed, guardian of Eber Weed, the sum of 112 dollars, and each settle with his own witnesses," with the usual averment that the defendant had not paid. Demurrer *inde*, showing for cause: 1st. That there was no profert of the award; 2d. That it was without the submission; 3d. That it wanted mutuality; and 4th. That it was not final.

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Herry, in support of the demurrer. As to the profert, no great reliance ought, perhaps, to be placed [*254] on that; but, *as the award was under seal, it would seem necessary to make the same profert which is required in pleading other instruments of a similar description. On the second point, it is to be observed, that the bond is in favor of the plaintiff individually; the defendant is bound to him personally; and the submission is, "by the said Caleb, and the said Noah, guardian as aforesaid," yet, the recital of the award states it to have been made by persons named "by and between Eber Weed, by his guardian, and Caleb Ellis." The infant does not submit. The recital, then, is plainly of an award not warranted by the submission. This is fatal; for the one must be according to the other. *Kyd*, 278. There is also a total want of mutuality. The payment of the 112 dollars is to Noah Weed, without a single act to be done by him; and it cannot be said that the money infers a release, because the rights of an infant cannot be submitted. He is not concluded; for he may, the very instant he is of age, disavow all his guardian has done. Therefore, it cannot be final. For the necessity of an award being mutual, *Kyd*, 218, 259, 260.

Woodworth, contra. The replication sets out the award in *hæc verba*, and, therefore, supersedes the necessity of a profert. Though an infant's rights cannot be disposed of by his guardian, yet there is such a general control over them, that they may be submitted to arbitration. In *Roberts v. Newbold*, Comb. 318. the very thing was done; and in 1 Com. Dig. 537, the same doctrine is recognised. At law, the guardian in a suit is the protector of the rights of the infant, and may bind himself that his ward shall perform. In an action by an infant, his guardian may receive the money recovered, and give an acquittance for it. He is the mere instrument through which the infant's claims are satisfied; and, therefore, the award of a sum of

money to him, it being for the benefit of the infant, is good, 1 Com. Dig. 543. Nay, an award of money to a third person is valid, if it appear that the parties submitted for him. *Bird v. Bird*, 1 Salk. 74. Certainly, then, it must be so, if to him who submits for another. The award is clearly mutual; *for to make it so, it is [*255] requisite only that the money paid be a final discharge of all claims.

LIVINGSTON, J. In *Purdy v. Delavan*, 1 Caines' Rep. 304, we decided that an award, ordering payment of a sum of money, carries in itself a mutuality, as it must be held to be in satisfaction of the matter submitted.

Woodworth. Then the only point is as to the right to submit. If the guardian has it, the receipt of the sum awarded in satisfaction of that which he was authorized to submit, must be final. The award of the arbitrators, after reciting the suit and submission, is, that they "thereupon" determine. In 1 Com. Dig. 548, it is laid down, "if there be a submission of all matters, an award, *de et super præmissis*, that one shall pay so much to the other, is good, for being *super præmissis*, (or thereupon,) it must be held to have been in satisfaction of the matter submitted."

Henry, in reply. The use of a profert is, that oyer may be demanded, and though a deed be set out in the declaration, profert is nevertheless necessary. But, it is confessed, this objection is not much relied on. The reasoning, however, of the other side, admits the award to be neither final nor mutual. It is acknowledged that the infant is not concluded; if so, it cannot be final, nor can it be mutual. To give it the semblance of mutuality, it should have gone further and awarded certain things to be done by the plaintiff, in case the infant should not abide by the determination of the arbitrators. The plaintiff was only guardian *ad litem*; and though a guardian in socage, or by

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nurture, or even a testamentary guardian, may submit, one who is merely *ad litem* cannot. His power is only for a specific purpose, and, as it is a delegated authority, cannot be exceeded or transferred.

LIVINGSTON, J., delivered the opinion of the court. The first objection to this award is founded on a want of power in the guardian to submit. Hence, it is said, the award is not mutual, and the infant's rights not concluded.

It is difficult to conceive how it should ever have been doubted whether guardians had this power, or whether they were not bound by their bond, or whether an [*256] award, *under these circumstances, did not put an end to all controversies submitted between the infant and other party. That an infant himself should not bind himself in this way is right,[1] but for this very reason a power should be lodged elsewhere; and where can it be so properly intrusted as to the very person who has the care of all his property? for the present plaintiff does not appear a guardian *ad litem* only, and must, therefore, be supposed competent to judge whether a suit or arbitration will be most likely to promote the interest of his ward. But his point is settled in *Roberts v. Newbold*, where it is allowed, that a guardian may submit for an infant, and even if the latter gives a bond himself, it is not void, but only voidable. With this also agrees the civil law, by which, although an infant cannot bind himself by a submission, yet, if any one will become his surety, a remedy may be had against the latter for the infant's non-performance.

There is as little reason to say the award is not final.

[1] A submission is entered into by A. and others (the widow and heirs of B.) of the one part, and C. of the other part; the former covenanting that certain infant co-heirs should abide by the award; the arbitrators awarded that C. should pay the other parties a specific sum of money; held, that although the submission was unauthorized in respect to the infants, the award was binding on the parties. (*Smith v. Van Nostrand*, 5 Hill 419.)

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After reciting their authority to settle all controversies between the defendant and infant, the arbitrators award, "that the former shall pay a certain sum to the guardian, and that each party shall settle with his own witnesses." There can be no doubt that payment of this sum to the guardian would operate as a discharge to the defendant for every demand of the infant, and that the award is, of course, sufficiently conclusive. The only remaining objection is, that no profit is made of the award in the replication. That this is necessary, we can find no authority. The action is on the bond, and, in answer to the plea, the award is set forth in *hæc verba*. - This is the usual way, and must be sufficient. (a) The replication is, therefore, good. [1] Judgment for the plaintiff.

(a) The reason why a *profit* of an award is not required, is, because it is not a deed. *Leafs v. Box*, 1 Wils. 121.

[1] A party, it seems, may avoid the effect of an award by showing that he was an infant when he made the agreement of submission. (See *Baker v. Lovett*, 6 Mass. Rep. 78, 80, per Parsons, C. J. *Britton v. William's Devises*, 6 Munf. 453. *Watson on Arb. and Awards*, 41. No. 31, Law Lib. Philadel. 2 R. S. 541, s. 1. *Kyd on Awards*, 35, *et seq.*) So, semble, as to a lunatic, *feme covert*, &c. (*Rumsey v. Leck*, 5 Wend. 20, 22. See *Watson on Arb. and Awards*, 43. No. 31, Law Lib. Philadelphia. 2 R. S. 541, s. 1. *Kyd on Awards*, 35.) An attorney, it has been intimated, has authority, as such, to submit for his client. Thus, where an attorney had submitted a question, as to his client's right of set-off, to the decision of a judge, extra judicially; the court, per Story, J., inclined to regard it as an award, and so conclusive. In respect to the attorney's power to make the submission, it was regarded as maintainable, and within his general authority. "If he exceeds it, the remedy for his client is to be sought in his own personal responsibility." (*Green v. Darling*, 5 Mason, 202, 205.) See *Washington v. M'Gee*, 3 Dana, 446, as to when a submission to a judge shall be deemed an arbitration. Further, as to an attorney's or an agent's authority in this respect, see *Eastman v. Burleigh*, 2 New Hampshire Rep. 484, 488. *Somers v. Balabrega*, 1 Dall. 464. *The Inhabitants of Duckland v. The Inhabitants of Conway*, 16 Mass. Rep. 396. *Holker v. Parker*, 7 Cranch, 496. *Watson on Arb. and Awards*, 49, 50. Law Lib. Philadelphia.

An award, like a judgment of a court of concurrent jurisdiction, binds only the parties and privies, so as to prevent them from again litigating the same subject matter which was determined by the award. But strangers to the submission can neither be benefitted nor prejudiced by an award.

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(Watson on Arb. and Awards, 145. Nos. 31 and 32, Law Lib. Philadelphia. Kyd on Awards, 42 to 49. See *Vosburgh v. Bame*, 14 Johns. Rep. 302. *Studebaker v. Moore*, 3 Binney, 124. *Commonwealth v. Simonton*, 1 Watts' Rep. 310. *Pullett v. Rainard*, 1 Whart. Rep. 524. *Jackson v. Davis*, 5 Cowen's Rep. 123.)

 CHEETHAM against LEWIS.

On an original suit in this court, the plaintiff may declare at any time, unless *nonprossed*.

EVERTSON moved to set aside the declaration, and stay all further proceedings, because, though the writ was returnable in November, 1803, the plaintiff had not filed and delivered his declaration till September last. He contended, that by the rules of the common law, a plaintiff [*257] was obliged *to declare within the year, and if he did not do so, he was *ipso facto* out of court. If some limitation of this sort was not in force, a cause might be hung up *ad infinitum*. In support of the application he cited 2 D. & E. 112, and particularly the reasoning of Buller, J.

Van Wyck, contra, argued that the only mode of putting a plaintiff out of court, was, by a rule to declare, or be *nonprossed*.

Per Curiam. There is no such rule of practice in this court as that insisted on by the defendant. It is in his power to *nonpros* the plaintiff if he pleases; if he does not, the plaintiff may declare at any time. The decision, however, in this case, will not apply to a suit removed by *habeas corpus*; for there, as the defendant cannot *nonpros*, he is bound to plead.

Motion denied.

Lenox v. Howland.

LENOX, MAITLAND and RENWICK *against* HOWLAND,
RUSSEL and others.

Under the act respecting absent and absconding debtors, this court will inquire into the foundation of the demand of the plaintiffs, and if it appear not to be such as to warrant the issuing an attachment, will order a *superseas*.

THE plaintiffs had, under the act authorizing proceedings against absent debtors, procured on the usual oath, an attachment against the property of the defendants, who resided in Massachusetts. They, by affidavit, set forth that they never had any dealings with the plaintiffs, who, as shippers of property on board the ship *Ocean*, belonging to the defendants, claimed compensation for damage the goods had sustained in consequence of the vessel's having been run ashore when going up the harbor of Liverpool, by alleged negligence or misbehavior of the captain, whereas the injury, if any, arose from the conduct of the pilot.

Colden and *Riggs*, on these facts, moved to supersede the attachment, notice of which had been duly published. They contended that the debts contemplated by the act were such as might be set off, the words of the statute being, that the demand must be 100 dollars above, or clear of, discounts. Torts and unliquidated damages, therefore, not within the purview of the law, because of them no set-off can be made. Bankrupt Act, s. 34. Coop. Bank. Law, 160, 224, 244. Sell. Prac. 42. 2 Caines' Rep. 33, *Brown v. Cumming*. *But allowing such a claim [*258] might be set off, the pilot, they said, was answerable. Malyne, 59. 7 D. & E. 160. They referred also to the decision of this court, in the matter of *Fitzgerald*, an absent debtor, 2 Caines' Rep. 318.

Hoffman and *Harrison*, contra, argued, that the court had no jurisdiction in this summary way, as the act had chalked

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out the only mode of proceeding by which a *supersedeas* could be obtained. That as to the matter of the claim being without the statute, the 21st section had ordered a bond to be given, to appear and plead to any action, and the terms of the condition were broad enough to include all cases, excepting pure torts alone; even to appear and answer to a bill in equity. To support the attachment, the oath of the plaintiffs is all that is required, and cannot be done away by a counter deposition from the defendants. It would be to try the cause by affidavit, and determine preliminarily, the fact of debt, or no debt. Whether the pilot or master were to blame, was not now to be investigated.

SPENCER, J., delivered the opinion of the court. We do not think that, because the statute points out a particular mode by which a *supersedeas* may be obtained, we are ousted of jurisdiction in this state of the case. We conceive that, from the general superintending power of this court, we have a right to examine whether the attachment has not improvidently issued, and, on this ground, review the order of the judge by whom it was directed.[1] On the present occasion, the plaintiffs have not contradicted the affidavit of the defendants, but, resting their opposition on the matter it details, have reposed themselves on its contents. Exercising, then, that right of control which we think we possess, we cannot but see that the plaintiffs have failed in showing such a debt as is within the purview of the act. The statute applies only to those which are capable of being set off, not to demands which arise from torts, or *ex delicto*. As, therefore, the claim of the plaintiffs is stated to be of this nature, proceeding from the misfeasance of the captain, and this is not denied by the opposite party, the motion must be granted; but with permission, however, to the plaintiffs, to show,

[1] If a plaintiff who brings suit by attachment against a foreign corporation, be a non-resident, the objection is best raised by a motion to set aside the attachment, but the objection cannot be raised at the trial by a motion for non-suit. *Downes v. Phoenix Bank*, 6 Hill, 297.

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any day within the term, that they have a debt such as is within the purview of the act.

KENT, Ch. J. I am against the motion, because I think the only remedy is under the 21st section of the act, which, in my opinion, is fully sufficient. If the bond there directed be given, the question, whether debtor or not, within the statute can be decided; for the instrument can apply only to debts within the law. The proceedings below are regular, and on that score, we have therefore, no right to interfere.

THOMPSON, J. I concur in the opinion of the Chief Justice.(a)[1]

(a) See this case, *post*, 323, on a subsequent application.

[1] The estate of debtors, who are abroad, is liable to an attachment, whether their absence from this state is permanent or temporary, voluntary or involuntary. The question in such a case is, where is the actual residence? and not where is the domicile? *In re Thompson*, 1 Wen. 43.

An executor or administrator who enters upon leasehold property held by the testator or intestate in his lifetime, or who receives the rents and profits thereof, is chargeable in the debt and detinet directly on the covenant of the lessee as an assignee, and in proceeding against him he need not be named as executor or administrator. *In the Matter of John Galloway*, 21 Wen. 32.

If he has no assets, or the land is in truth not worth the sum due, he may show those facts in defence; *prima facie*, however, the land is deemed worth more than the sum demanded. *Id.*

Being personally liable, he may be proceeded against by attachment under the act relative to absconding, concealed and non-resident debtors. *Id.*

A non-resident creditor may institute proceedings under this act against a non-resident debtor, where the debt is due on a contract made within this state. *In the matter of Brown*, 21 Wen. 318.

It is enough that the affidavits of the two witnesses, required by the statute to be presented on the application for an attachment, state that the debtor is a non-resident, or that, being an inhabitant, he has secretly departed from the state, or keeps himself concealed with intent to avoid the service of civil process; it is not necessary that these affidavits should contain any thing as to the nature of the debt, or the residence of the creditor. *Id.*

An attachment does not lie against an administrator for a demand against his intestate, under the act. *In the matter of Hurd & Seldon*, 9 Wen. 4.

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An attachment does not lie against persons claiming merely by right of representation. *Jackson ex dem. Murray v. Walsworth*, 1 J. C. 372.

But where the debtors were named, some as trustees, some as executors, &c., held, after a lapse of time and acquiescence of parties, that these would be deemed mere words of description, so as to support the proceedings: *Id.*

An absconding debtor may be proceeded against by an absent creditor. *Robbins v. Cooper*, 6 J. C. R. 186. *Ex parte Caldwell*, 5 Cow. 293.

Aliter, as to an absent or non-resident debtor. *In the matter of Fitzgerald*, 2 Ch. R. 318.

And a person residing abroad; but who has been transiently within the state, cannot be deemed an absconding debtor. *Id.*

Aliter, as to a person who comes here to reside, and then absconds. *Id.* *Ex parte Caldwell*, 5 Cow. 293.

An attachment does not lie against a corporation. *M'Queen v. Middletown Man. Co.*, 16 J. R. 5.

It may issue against the property of one of several partners, who absconds, for a partnership debt, though his co-partners reside within the state, and might be arrested. *Matter of Chipman*, 14 J. R. 217.

So it may issue for the separate debt of such absconding debtor. *Matter of Smith*, 16 J. R. 102.

By the act of 1842, provision was made for seizing trust property, real and personal, in proceedings by attachment against foreign corporations, the attachment must be executed by leaving a true and attested copy of the writ with the trustee, because the trustee, being within the jurisdiction of the state, can be reached by personal service; he is, moreover, the representation of the beneficial owner, and may be interested in the defence of the suit. *Wright v. Douglass*, 3 Barb. 554.

Attachment may issue against non-resident debtors, upon an unliquidated debt. *Matter of Marty*, 3 Barb. 229.

A supersedeas to an attachment under the absconding, concealed and absent debtor act, will be granted on showing a settlement between the attaching creditor and the debtor, although trustees have been appointed; the rights of the trustees, however, will be protected, and the time will be given to other creditors to come in. *In the matter of Bunch*, 9 Wen. 473.

Where persons proceeded against as absconding or concealed debtors, satisfactorily show that they had not absconded, or were not concealed, a supersedeas will be granted with costs, although the creditor had reason to believe that the debtors had absconded or were concealed. *In the matter of Warner*, 3 Wen. 424.

If a plaintiff, who brings suit by attachment against a foreign corporation, be a non-resident, the objection is best raised by motion to set aside the attachment; but the objection cannot be raised at the trial by motion for non-suit. *Downes v. Phoenix Bank*, 6 Hill, 297.

Supersedeas will be granted to an attachment under the act relative to absent and absconding debtors, if the process issued improvidently. *Ex parte Chipman*, 1 Wen. 66.

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Supersedeas is final. *Learned v. Duval*, 3 J. C. 141.

The court may, on motion, examine whether the attachment was improvidently issued, and if found to have been improperly granted, may award a supersedeas. *Lenox v. Howland*, 3 Cal. R. 257. *M^cQueen v. Middleton Man. Co.*, 16 J. R. 5.

An attachment regularly issued against a non-resident debtor cannot be superseded by the officer granting it, except in the cases provided for by the statute; it cannot be done on affidavits contradicting the fact of residence, nor can the supreme court issue supersedeas, except on the return of the officer to a certiorari directed to him. *Matter of Marty*, 3 Barb. 229. N. Y. Dig., vol. 2, p. 682, *et seq.*

BENNETT against WARD.

If, in a statute, a clause creating a new offence, and inflicting a penalty, be so defectively worded, that by one part it appears to be recoverable in a summary way, and by another, according to the usual course of proceeding, the latter shall be preferred. All statutes giving summary modes of recovery, are to be strictly construed.

On certiorari to a justice's court, in a suit under the 19th section, (1 Rev. Laws, 595,) of the "act to regulate highways," by which it is ordained, that the penalty of 5 dollars, imposed for obstructing roads, shall be recovered "in the name of any person who shall make complaint thereof, before any justice of the peace of the county where the offence shall happen, upon the oath of one or more credible witnesses, and levied by distress and sale," &c.

Cady assigned for error, that by the return, it appeared a regular action of debt had been instituted, instead of the summary mode prescribed by the statute. This point, he said, had been already ruled, in a case of *Hamilton v. Burton*, decided in April, 1800. For where an act creates a new offence, and points out how the penalty inflicted is to be recovered, no other method can be pursued. 4 Bac. Abr. old edit. 654, *Rex v. Right*, 1 Burr. 543. An advantage re-

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sulted, he urged, from the adoption of the summary proceeding ordered by the law, because, in such cases, the evidence is necessarily returned.

Gold, contra. It appears, that the parties agreed to go to trial, and whatever advantage might have been taken of this objection, had it been made at a proper time, is now waived.

Cady, in reply. If the magistrate had not authority to *take cognizance of the cause in this manner, consent will not give him jurisdiction. Besides, the levy is, after conviction, to be by warrant of distress; and upon a regular judgment in debt, the usual writ of execution ought, perhaps, to go.

Per Curiam. The suit below was an action of debt, conducted according to the regulations of the 10th act, and was brought to recover the penalty or forfeiture of 5 dollars, under the 19th section of the act to regulate highways, which declares, that "if any person shall obstruct any highway, &c., such person so offending shall forfeit, for every such offence, 5 dollars, to be recovered, with costs of suit, in the name of any person who shall make complaint thereof, before any justice of the peace, &c., upon the oath of one or more credible witnesses, and levied by distress and sale of the goods of the offender, by warrant from the justice, to be directed to any constable of the town, &c., and the constable is required to pay such penalty into the hands of the commissioners of highways, &c., to be applied in improving the public roads and bridges in such town."

The question is, whether the above recovery ought to have been in the manner prescribed by the 10th act, or ought to have been in a summary way, as the section under which it was had would seem to prescribe?

The section in question is very defectively drawn. One part of it seems to contemplate a recovery by an action or suit in the ordinary mode; and the other part of it, so far

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at least as relates to the collection of the money by the constable, uses language applicable only to cases of summary convictions. And where a statute admits of two constructions, it is advisable to give it that which is consonant to the ordinary mode of proceeding before magistrates, as being the most familiar to them, and because in that the trial by jury is secured. Summary convictions are authorized frequently in the English laws, and they are required in three different cases in the act before us, viz., under the 11th, 12th, and 23rd sections. But this mode of proceeding is always strictly construed by the courts, and is not to be adopted but where the language of the law is positive and unequivocal.[1]

Judgment affirmed.

[1] A penal statute should be strictly construed. *Sprague v. Birdsell*, 2 Cow. 419.

So, of a statute in favor of corporations or particular persons, and in derogation of common right. *Id.* *Sharp v. Speir*, 4 Hill, 76; *Sharp v. Johnson*, 4 Hill, 92.

They should not be extended beyond their express words, or their clear import. *Id.*

The court will take judicial notice of public statutes. *The People v. Herkimer*, 4 Cow. 345.

If a statute give a remedy in the affirmative, (without a negative express or implied,) for a matter which was actionable at the common law, the party may still sue at the common law as well as upon the statute; for this does not take away the common law remedy. *Orittenden v. Wilson*, 5 Cow. 165.

A special power granted by statute, affecting the property of individuals, ought to be strictly pursued, and appear to be so on the face of the proceedings. *Gilbert v. Columbia Turnpikes Company*, 3 J. C. 107; *Buller v. Palmer*, 1 Hill, 324.

A penal statute which may be construed as authorizing either a summary remedy, or an action in the ordinary course of proceeding, shall be taken to mean the latter. *Bennett v. Ward*, 3 Cai. R. 259.

A summary conviction is to be strictly construed, and is only to be adopted where the language of the act is positive and unequivocal. *Id.*

Where the computation of time in a statute is to be from an act done, the first day should be excluded. *Ex parte Dean*, 2 Cow. 605; *Lester v. Garland*, 2 Cow. 506, n. a. discussed; *Presbrey v. Williams*, *id.* discussed.

E. g., under the statute (sess. 41, ch. 94, s. 17), prescribing the time within

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which an appeal should be brought from a justice's court. *Id. Simp v. Hampton*, 2 Cow. 612. n. s. *Brown v. Brown*, *id.*

Where the computation of time in a statute is to be from an act done, the first day, or day of the act should be excluded. *Ex parte Dean*, 2 Cow. 605; *Hopman v. Liswell*, 6 Cow. 659.

To take private property for public use, without providing just compensation to the party, is not only unconstitutional, as against the fundamental principle of government, but a violation of natural right and justice. A statute, therefore, which violates the principle is null and void. *Bradshaw v. Rodgers*, 20 J. R. 103. S. C. in error, *id.* 735.

An existing provision for reviewing the decisions of an inferior tribunal by appeal or certiorari, will apply to cases subsequently added to as jurisdiction by statute, though the latter contain no express declaration to that effect. *The People ex rel. Durham v. The Commissioners of the Canal Fund*, 3 Hill, 599.

A statute, imposing a penalty, implies also a prohibition of the act rendered penal, and such act is, consequently, illegal and void. *Hallett v. Novion*, 14 J. R. 273, 290.

A statute, penal as to some persons, if it is generally beneficial, may be equitably construed. *Sichles v. Sharp*, 13 J. R. 497.

An act extending the bounds of a town over the adjacent navigable waters, does not thereby grant the land covered by the water to the town, but is merely for the purpose of civil and criminal jurisdiction. *Palmer v. Hight*, 6 J. R. 133.

A penalty cannot be raised by implication, but must be expressly created and imposed. *Jones v. Estie*, 2 J. R. 379.

If a public body or officer is clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty, though the statute creating it to be only permissive in terms. *The Mayor of the City of New York v. Hurst*, 3 Hill, 612.

Conveyances by authority of a statute, pass no other or different right than that which the party before possessed. *Jackson ex dem. Cooper v. Cory*, 3 J. R. 385.

Where a right is granted by statute, and a subsequent statute gives a forfeiture or penalty for the violation of that right, such forfeiture or penalty is cumulative to the remedy provided by the common law in cases of the violation of a statute right, where the statute itself is silent. *Livingston v. Van Ingen*, 9 J. R. 507. See *Stagford v. Ingersoll*, 3 Hill, 28.

And it seems that the law would be the same, if the penalty were given by a subsequent clause of the same statute. *Id.*

An act of the legislature is not to be construed to operate retrospectively, so as to take away a vested right. *Dash v. Van Kleeck*, 7 J. R. 475.

Unless the intention so to operate is expressly declared. *Johnson v. Burwell*, 2 Hill, 238.

It is a principle of universal jurisprudence, that laws, civil or criminal, must

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be prospective, and cannot have a retro-active effect. *Dash v. Van Kleeck*, 1 J. R. 477.

The term *ex post facto* law, in the constitution of the United States, applies only to criminal cases. *Id.*

Where the law, antecedently to a revision of the statutes, is settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to make a change. *Snyder v. Delancy*, 3 C. C. E. 143. *Case of Yates*, 4 J. R. 259.

In construing a statute, the intention of the legislature should be followed wherever it can be discovered, although the construction seems contrary to the letter of the statute. *Grinsaid v. National Ins. Co.*, 3 Cow. 89; 15 J. R. 399. *Crocker v. Crane*, 21 Wen. 21.

A thing which is within the letter of a statute is not within the statute, unless it be within the intention of the makers. *Id.*

A penal statute is not to be extended by an equitable construction. *Myers v. Foster*, 6 Cow. 567.

Two statutes shall stand together, and both have effect if possible; for the law does not favor repeals by implication; and all acts in *pari materia* should be taken together, as if they were one law. *M'Cartee v. Orphan Asylum*, 9 Cow. 437. *Brown v. Lease*, 5 Hill, 231.

And where an English statute, or part of an English statute is incorporated without variation into our *exra*, and the same had received a judicial exposition in that country, at the time of its adoption, the courts here will, as a general rule, conform to that construction. *M'Cartee v. Orphan Asylum*, 9 Cow. 439.

In proceedings against a disturber of religious meetings, it is not necessary that process should actually issue; it is competent to a defendant voluntarily to appear and answer to the complaint. *Foster v. Smith*, 10 Wen. 377.

Where a statute declares that an act done within a certain number of days, Sunday must be reckoned as one, though it happen to be the last. *Ex parte Dodge*, 7 Cow. 147.

Thus, in the time given for appealing by statute, (secs. 47, ch. 238, s. 36,) the fifty dollar act. *Id.*

The general rule as to the computation of time is, that where months are mentioned in a statute, lunar months are intended. *Loring v. Halling*, 15 J. R. 120.

It was there held that the six months mentioned in relation to the foreclosure of mortgages were lunar months. *Id.*

But where words were found in a statute which, in the opinion of the court, showed that calendar months were intended, they must be construed as calendar time. *Snyder v. Warren*, 2 Cow. 518.

But where there is nothing in a statute speaking of months, from which

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it can be inferred that calendar and not lunar time was intended, the months will be considered lunar. *Parsons v. Chamberlin*, 4 Wen. 512.

Months in relation to promissory notes or bills of exchange, are calendar and not lunar. *Leffingwell v. White*, 1 J. C. 99.

The words "shall or may," when used in a statute, are imperative only when the public interest and rights are concerned; but when a statute declares that an individual or individuals shall or may do certain acts, or have a certain remedy, which is intended for his or their own benefit, he or they have a discretion to do the act, or pursue the remedy, or not. *Malcom v. Rogers*, 5 Cow, 188. See *The Mayor of the City of New York v. Furns*, 3 Hill, 612.

The only effect of the revised statutes upon offences committed previous to those statutes going into operation is, that the proceedings in prosecution for such offences must be conducted according to the provisions of those statutes; if the punishment for such offences is mitigated by those statutes, such mitigated punishment only can be applied. *The People v. Phelps*, 5 Wen. 10.

A by-law or ordinance of the corporation of the city of New York, made by virtue of the authority given by the act of the 2d of April, 1808, (sess. 29, ch. 126, s. 15,) ordained, that if any person kept a greater quantity of gunpowder than twenty-eight pounds, at one time, in any one place, or if the same should not be kept in the manner prescribed by the ordinance, such person shall forfeit all the gunpowder so kept contrary to the by-law; and also \$125 for every 100 pounds of gunpowder, and in that proportion, for a greater or less quantity. By the act the corporation were empowered to provide for the forfeiture of the gunpowder, if kept contrary to such by-law; and to impose penalties for the non-observance of the by-law, in all cases not provided for by the act, &c. In an action to recover penalties under their by-law, to the amount of \$3000; it was held, that the plaintiffs could not exact as penalties for any one offence, or for the violation of such by-laws in any one transaction, a greater sum than \$250. *Corporation of New York v. Odeman*, 12 J. R. 122.

As the act of the legislature, on the subject matter of the by-law, is to be presumed to have been passed at the instance of the corporation, it so far operates as a limitation on the general and undefined powers in the charter. *Id.*

The preamble of a statute may be referred to, to explain the enacting part, when it is doubtful, but not to restrain its meaning when clear and unambiguous. *Jackson ex dem. Woodruff v. Gilchrist*, 15 J. R. 89.

Where the words of a statute are obscure or doubtful, the intention of the legislature is to be resorted to in order to discover their meaning. *The People v. The Utica Ins. Co.*, 15 J. R. 358.

A thing within the intention, is as much within the statute as if it were within the letter, and a thing within the letter is not within the statute, if contrary to the intention of it. *Id.*

Such construction ought to be given as will not suffer the statute to be eluded. *Id.*

Case v. De Goes.

A statute restraining any person from doing certain acts, applies equally to corporations or bodies politic, although not mentioned. Id. N. Y. Dig., vol. 4, p. 1163, *et seq.*

*CASE against DE GOES and others. [*261]

Trespass will not lie against a third person, acting under license from one who was in possession under a writ of restitution awarded, on conviction for a forcible entry and detainer, by a court having jurisdiction, though the indictment be afterwards quashed, and a re-restitution directed; for a man cannot be a trespasser by relation.

TRESPASS for cutting down and carrying away a quantity of saw-logs, after notice of title, and being forbidden. The defendants justified under a license from one Abraham Bull, who at the time of the trespass, was in possession, by virtue of a writ of restitution, awarded upon an indictment against the now plaintiff for a forcible entry and detainer, which was afterwards quashed for irregularity, and restitution directed.

A verdict having been found in favor of the plaintiff, a motion was now made to set it aside, on the following grounds: 1st. That as he was not in actual possession when the trespass was committed, the action would not lie. 2d. That if maintainable at all, it was against Bull, who possessed the *locus in quo* at the time.

Foot, for the plaintiff. Those claiming under title from a person who has been turned out of possession, in consequence of quashing an indictment for forcible entry and detainer, are trespassers themselves. Com. Dig. tit. Trespass, B. 2. "A disseisee shall have trespass against a stranger, for a trespass done during the disseisin, for by re-entry, he reverts the possession in himself *ab initio*," citing 2 Roll. 554, l. 89. So here, by the re-restitution, we are as if we never had been out of possession; (See *Gilbert's*

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Tenneyes, 47,) it follows, therefore, that we are entitled to all the remedies attendant on actual occupation. (See *Batler v. Baker*, 1 And. 352, Godb. 388; *Moore v. Hussey*, Hob. 98; 2 Roll. Abr. 550, l. 10, Ibid. 554, Co. Litt. 257, a. *Lifford's Case*, 11 Rep. 51, Dy. 316, Moore, 461. *Holcombe v. Rawlins*, Cro. Eliz. 540. 1 Burr. 81, (Arguendo by counsel,) and the decision of this court, in *Case v. Shephard*.) The circumstance of being warned not to cut the timber takes away all pretence of justification under the license. They knew Bull to be a trespasser himself, and therefore unable to give permission.

Woodworth, contra. On the general principles of law which govern the action, the plaintiff, as he was out of possession, cannot recover. Bull held under legal title by judgment of law. It was good so long as that [*262] judgment remained *in force, unless it be contended, that the re-entry under the writ of restitution should relate back so as to affect third persons. This cannot be, because the justice had cognizance of the subject matter. It was within the scope of his general jurisdiction, and the rendering the judgment of restitution was no more than what he was authorized to do. The present case, therefore, differs from those where the magistrate has no jurisdiction, and the proceedings *coram non iudice*. *Perkins v. Proctor and Green*, 2 Wils. 285. The same reasoning applies to judgments reversed for error, as well as irregularity.

That the defendants were warned not to cut the wood, is immaterial. They had nothing to do with remote and latent claims, and the plaintiff can look only to the party in possession: to him in whose hands the land really was. In trespass, a constructive possession is not sufficient. *Mauvill's Case*, 13 Rep. 21, 22. This is there expressly said: "When any man recovers possession or seisin of land, by erroneous judgment," &c., "the same stands in force till reversed; and, therefore, the plaintiff in the writ of error,

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after the reversal, shall not have an action for a trespass *mesne*, because he shall recover all the *mesne* profits against him who recovered; nor he that recovereth shall be after barred of his action of trespass for a trespass *mesne*, by reason that his recovery is reserved, because he shall answer for all the *mesne* profits to the plaintiff in the writ of error." It is settled law, that the rights of third persons are equally protected, whether they be under irregular or erroneous judgments.

THOMPSON, J., delivered the opinion of the court. It has been submitted to the court to determine whether an action of trespass can be sustained against the present defendants. We are satisfied, from an examination of the authorities, that it cannot. Bull was put into possession by the judgment and proceedings of a court having jurisdiction of the subject matter. These proceedings, however, having been set aside for irregularity, Bull may be considered a trespasser by relation, and be made answerable for the *damages. But it is a general [*263] rule with respect to the doctrine of relation, that it shall not do wrong to strangers. 16 Vin. Abr. 293. This rule is fully recognised in *Menville's Case*, 13 Coke, 21, where it is said, that by relation, a thing may be considered as annulled *ab initio*, betwixt the same parties, to advance a right; but the law will never make such a construction to advance a wrong, or to defeat collateral acts, which are lawful, and principally, if they concern strangers. Thus, also, in *Lifford's Case*, 11 Coke, 51, it is ruled, that where a person is disseised, the disseisee, after re-entry, can maintain trespass against the disseisor; for the law, as to the disseisor and his servants, will suppose the freehold to have continued in the disseisee; but not so with respect to strangers, who come in by right or title under the disseisor; they cannot be made trespassers by relation. These authorities we think conclusive, in the present case, and go fully to exonerate the defendants. The defendants

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having been warned by the plaintiff not to cut the timber cannot affect the question. They were not bound to inquire into the regularity of the proceedings by which Bull was put into possession. As it respected them, it was enough that he was there by the proceedings and judgment of a court of competent jurisdiction.

The opinion of the court, therefore, is, that the defendants are entitled to judgment.

WARD, administrator of NOBLES, *against* SACKRIDER.

Where the declaration consists of two counts, one good and the other bad, if to the latter be pleaded an insufficient bar, going to the whole cause of action, to which the plaintiff demurs, still he will be entitled to judgment on the count which is good.

ON demurrer. The second count of the declaration was on a note or memorandum in writing, by which the defendant acknowledged to have received of Nobles forty-two dollars, which he promised, on demand, to pay and re-fund, "provided the said Nobles should make it appear (meaning thereby that the said Nobles should give reasonable evidence) that he the said Nobles was not able to hold a certain lot of land (meaning thereby, if the title so conveyed should prove defective) before that time sold and quitclaimed by the said Sackrider to the said [*264] *Nobles, in his lifetime," with an averment that Nobles, in his lifetime, and the plaintiff, since his death, had made it appear, by good and sufficient evidence, that the land could not be holden by virtue of the quitclaim. To this the defendant pleaded in bar, that Nobles, in his lifetime did not make it appear, and the plaintiff, since his death, had not made it appear to the said Sackrider, that Nobles was not able to hold, &c. *Demurrer inde*, showing

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for cause, that the plea did not put in issue any new fact, and amounted to the general issue only.

Gold, for the plaintiff, cited, in support of the demurrer, *Leyfield's Case*, 10 Rep. 95; *Lynner v. Wood*, Cro. Car. 157, 4 Bac. Abra. old edit. 60, 61; *Hallet v. Burch*, 3 Salk. 272.

Emott and *Foot*, contra. As this case comes before the court on demurrer, judgment must be against him who committed the first fault. The declaration, then, is clearly defective. It ought to have averred either an eviction, or that the possession could not be obtained. The memorandum, too, is declared on as a specialty, and yet no seal is shown. We deny that the plea amounts to the general issue. It admits the assumpsit as laid, but shows in bar, that the contingency on which we were to refund has never happened.

Gold, in reply. Even in covenant the count may be as broad as the instrument declared on. No more is done here than to follow the words of the instrument. Lord Holt himself did not object to declaring on written instruments *in hæc verba*; he only insisted on the setting forth a consideration. The bare reading the plea shows it does not put any new matter in issue, and is therefore no more than the general issue.

SPENCER, J., delivered the opinion of the court. There are two counts in the plaintiff's declaration; one for money had and received, another on a memorandum in writing. The latter count states, that by a note or memorandum in writing, the defendant acknowledged to have received of the intestate 42 dollars, which he promised to refund, if the intestate *would make it appear that [*265] he could not hold a certain lot of land, sold and quitclaimed by the defendant to him, averring that the memorandum meant, that if the title so conveyed should

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prove defective, then the money was to be refunded ; averring also, that the intestate, before his death, and the plaintiff since, had made it appear, by good and sufficient evidence, to the defendant, that the intestate could not hold and possess the said lot of land by virtue of the said quitclaim. To the first count the defendant has pleaded *not assumpsit*, and to the second in bar, that the intestate did not, in his lifetime, and the plaintiff has not, since his death, made it appear to him, that he was not able to hold the said lot of land by virtue of the said quitclaim.

To this last plea the plaintiff has demurred specially that the plea in bar amounts to the general issue.

That the plea is vicious, and amounts to the general issue, is beyond a doubt. The defendant's counsel, sensible of this, insist that the second count in the declaration is bad: 1st. Because the memorandum is declared on as a specialty; and, 2d. Because the averments do not correspond with the true exposition of the contract.

The first objection is not well founded. The consideration is expressly stated to be the 42 dollars, admitted by the memorandum to have been paid by the intestate to the defendant. An averment of that payment would have been superfluous. This objection is of no weight.

The second objection has more weight, and might be fatal but for one circumstance. The second plea is to the whole cause of action, and extends as well to the second count as the first, which is confessedly a good count. If, therefore, this plea be considered in the light of a general demurrer, on the supposition that the plaintiff has committed the first fault in pleading, still the plaintiff is entitled to judgment; on the ground that one of his counts is good, and thence no objection to this result; because, on that count if the plaintiff has a just right to recover, he can take his verdict, and it is broad enough to embrace his case.

Judgment for the plaintiff.

Pease v. Barber.

***PEASE, executor of PEASE, against BARBER. [*266]**

Interest may be recovered under a count for money had and received.

IN assumpsit for money had and received, the judge charged the jury to allow interest, which was accordingly done. The question, now without argument submitted, was, whether, under a count for money had and received, a plaintiff could recover interest?

KENT, Ch. J., delivered the opinion of the court. The particular circumstances attending this case are not disclosed, and we are therefore to determine whether interest can, in any case, be recovered under the count stated.

The English court of C. B., in the case of *Walker v. Constable*, 1 Bos. & Pull. 307; and again in the case of *Tappenden, &c. v. Berrdall*, 2 Bos. & Pull. 472, decided that in an action for money had and received, the plaintiff could not recover beyond the net sum received, without interest, and the opinion is said to have been founded upon the authority of *Moses v. Macferlan*, 2 Burr. 1005. The point does not appear to have been argued in either case, and the reporter has not favored the public with the reasons on which the opinion was founded, (if any reasons were given,) except a naked reference to the case in Burrow. But on examining that case, the question of interest does not appear to have arisen, and is not once mentioned. The court confined themselves to the discussion of the general principles of the action, and those principles rather favor than contradict the position, that interest may be recovered in that form of action. The case of *Robinson v. Bland*, 2 Burr, 1077, which was decided shortly after that of *Moses v. Macferlan*, shows pretty clearly that the question of interest was not considered as being involved in the former decision, and interest was allowed to be recovered under the money counts, which were counts for money had and received,

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and money lent, and there was no distinction raised as between the two counts.

The action for money had and received is an equitable action, and the party must show that he has equity [*267] and *conscience on his side. The rule in equity is to allow interest in many cases for money had and received, *Barwell v. Parker*, 2 Vesey, 364; *Elkins v. East India Company*, 1 P. Wms. 396. *Lynch and Stoughton, v. Administrators of Gardoqui*, decided in the court of appeals in this state, in 1802.

We are of opinion, therefore, that interest may be recovered in an action for money had and received; and, for what appears to the contrary, it may have been proper in the present case; and as the defendant has not disclosed by his case the circumstances attending it, we are to intend interest was properly allowed. There may be cases in which the defendant ought to refund the principal merely, and there may be other cases in which he ought, *ex æquo et bono*, to refund the principal with interest. Each case will depend upon the justice and equity arising out of its peculiar circumstances, to be disclosed at the trial.[1]

Judgment for principal and interest.

[1] Interest is allowable on money advanced. *Liotard v. Graves*, 3 Cal. R. 226.

On an account current, interest is allowable only on such items in it as are for moneys advanced, except the usage of the trade in which the account arose has provided otherwise. *Id.*

Interest may be recovered in an action for money had and received. *Pease v. Barber*, 3 Cal. R. 266.

But whether it shall be recovered or not, must depend upon the justice and equity of the case. *Id.*

Where there was a special agreement, that the plaintiffs should pay interest for so much as the wines shipped by the defendants might produce, more than sufficient to reimburse to them the value of the merchandize which they consigned to the defendants; but there was no stipulation for interest in case, as it happened, the sale of the wines should not be equal to the value of the cargoes furnished by the Kanes; the court would not construe the contract to mean that the defendants should be liable for interest,

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for which there was no stipulation, if the result of the adventure should leave them a sum to make the plaintiffs good. *Kane v. Smith*, 12 J. R. 156.

Colden, senator, observes: "however it may be with respect to money lent, or as to money had and received, or in regard to merchandise sold and delivered; or however it may be where advances are made in pursuance of an express agreement, in which nothing is said about interest, it is now a well settled general rule of law, that where advances are made in money by one person for the use of another, under an implied authority, he who makes the advance is entitled to interest from the time it was made. *Rensselaer Glass Factory v. Reid*, 5 Cow. 602.

In that case, the account was wholly for cash advances made by the agent, on the one side; and on the other for cash received by him; and therefore, it was not a mutual running account, in the sense of those terms, as they are commonly used. *Id.*

And the majority of the court for the correction of errors, concurred in the general result of the above observations, thereby affirming the judgment of the supreme court, who allowed interest on all cash advances of the agent. *Id.*

Spencer, senator, took a different view of the subject; and was for reversing so much of the judgment of the supreme court as allowed the defendant in error any interest before the commencement of the suit. *Id.* 604.

He considered it established beyond question, that the allowance of interest was always founded on the agreement of the parties. *Id.*

This agreement may be expressed in writing, or by words; or it may be implied. If the agreement be in the note or other instrument, that interest shall run with the debt, it is invariably assessed. If there be a verbal agreement to pay it, that is equally binding. *Id.*

This agreement also, may be implied, 1st, from the custom or usage of the business in which the debt is contracted. When such custom is known, or may reasonably be presumed to have been known, it enters into the original contract, and forms a part of it. But there ought to be no evidence that such custom was known. *Id.*

2d. Where the principal is to be paid at a specific time, the law will imply the payment of interest from that time. *Id.*

He also considered the policy of the law adverse to the allowance of interest to an agent or trustee for advances. *Id.*

But where an agent has expended money by directions of his principal, there can be no reason for distinguishing it from the case of money lent or advanced by any other person. *Id.*

So, if advances are made by an agent with the knowledge and acquiescence of his principal, it is but advancing a step to presume a request; and thence an implied agreement to pay; and on a default in payment, the like agreement, as in all other cases of default, to pay interest. *Id.*

So, an advance of a single item, on a particular occasion, or a few sums, may, from the circumstances, furnish ground for presuming knowledge in the

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principal, acquiescence by him, and an implied promise to pay immediately, which carries interest from the time of default. *Id.*

The same principles are applicable to the case of mutual credits, between an agent and his principal. There must be a knowledge by the principal that the advances are making for him, and an acquiescence, to supply the want of a request. There must be a default on his part before he can be charged with interest; for he considered the cases as establishing the universal maxim that there can be no interest without default, where, by the contract, it does not run with the principal. *Id.*

A man is not obliged to pay for the use of money or other property which has been applied to his benefit without his consent. *Id.*

Thus, where labor voluntarily performed by the plaintiff for the defendant, without his privity or request, however meritorious or beneficial it may be to the defendant, as in saving his property from destruction by fire, affords no ground of action. *Bartholomew v. Jackson*, 20 J. R. 28.

Spencer, J., also cited the opinion of Ch. J. Tilgham, (1 S. & R. 179,) as containing the law, and the principle of it that until the defendant was informed that the plaintiff's money was applied to his use, he was in no default, and therefore ought not to pay interest; but being informed he became a wrong doer in withholding payment, and therefore should pay interest. *Renss. Glass Factory v. Reid*, 5 Cow. 624.

An ordinary agent or attorney is not chargeable with interest on money received for his principal, if he duly advises his principal of its having been received, until payment is demanded from him. *Williams v. Storrs*, 6 J. Ch. R. 350.

It is otherwise, if he has received special instructions to remit as fast as received. *Id.*

If a sheriff retains money after the return day of the execution, he is liable for interest. *Crane v. Dygert*, 4 Wen. 675.

Interest is allowed in actions for money had and received. *Pease v. Barker*, 3 Cai. R. 266.

Kent, C. J., says, "the case of *Robinson v. Bland*, 2 Burr. 1077, which was decided shortly after that of *Moses v. Macferlan*, shows pretty clearly, that the question of interest was not considered as being involved in the former decision, and interest was allowed to be recovered under the money counts, which were counts for money had and received, and money lent, and there was no distinction raised as between the two counts." *Id.*

The action for money had and received is an equitable action, and the party must show that he has equity and conscience on his side. The rule in equity is to allow interest in many cases for money had and received. *Barrowell v. Parker*, 2 Vesey, 364; *Elkins v. East India Co.*, 1 P. Wms. 396; *Lynch & Stoughton v. Adm'rs of Gardoqui*, decided in the court of appeals in this state, in 1802. *Id.*

We are of opinion, therefore, that interest may be recovered in an action for money had and received; and, for what appears to the contrary, it may have been proper in the present case; and as the defendant has not disclosed

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by his case the circumstances attending it, we are to intend interest was properly allowed. There may be cases in which the defendant ought to refund the principal merely, and there may be other cases in which he ought, *ex equo et bona*, to refund the principal with interest. Each case will depend upon the justice and equity arising out of its peculiar circumstances, to be disclosed at the trial. Id. N. Y. Dig., vol. 3, p. 191, *et seq.*

REYNOLDS *against* CORP and DOUGLAS.

If a defendant be liberated from confinement for want of being charged in execution, trespass will not lie against the plaintiff and his attorney, for imprisoning him a second time, on a *ca. sa.* issued on the old judgment in the suit from whence he was discharged, the process being only voidable.

THIS was an action of trespass, assault, and false imprisonment, brought against the defendants, under the following circumstances.

The plaintiff, in a suit against him by Corp, in which Douglas was the attorney, had, in exoneration of his bail, been surrendered to prison, from whence he was liberated by a regularly obtained *supersedeas*, for want of being charged in execution in due time. After this Douglas issued a *ca. sa.* upon the old judgment on which Reynolds had been in custody, took him in execution, and kept him in confinement from the first of December to the twentieth of February following, on which day he was, by the order of Douglas, discharged.

On the trial, the counsel for the defendants contended, 1st. That the action would not lie; because, so long as the judgment on which the *ca. sa.* was issued, remained unreversed, it warranted the writ; the proceedings on which could not, therefore, amount to a trespass; 2d. That the execution, being according to the judgment, was a complete *justification to the defendants; 3d. That [*268] the statute(a) authorising the *supersedeas* does not

(a) Act for the relief of debtors, with respect to the imprisonment of their persons. 1 Rev. Laws, 290, s. 12.

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inhibit the subsequent issuing of a *capias ad satisfaciendum*; 4th. That, in order to impeach the execution, the award of the *supersedeas* should appear on the record, that it might, on the face of it, show how the now plaintiff was exempted from the operation of the *ca. sa.* The judge, however, overruled all these positions, and charged for the plaintiff, in favor of whom the jury found.

The application now was, to set aside this verdict, and grant a new trial for the reasons insisted on at *nisi prius*.

Van Vechten, for the defendants. A *supersedeas* is no more than an authority for the sheriff or jailer to discharge. It does not abrogate the judgment, and the words of the law do not take away our right to proceed upon it. The statute says (1 Rev. Laws, 296, s. 12,) "if any plaintiff shall obtain judgment, &c., against any defendant in custody, &c., and shall not charge such defendant so remaining a prisoner in execution, within three months next after such judgment obtained, then such defendant, so remaining, &c., may be discharged out of custody, by a *supersedeas*, to be allowed by one of the judges of the court," &c. The judgment, therefore, continues in full force. If the *supersedeas* is to have the effect of destroying its operation, the *supersedeas* should constitute a part of the record; for that which is on record can be done away by matter of record alone. Plowd. 229. Should the court be against us on these points, the excessiveness of the damages ought to induce a new trial. They ought to have been merely nominal. It is enough to lose the debt.

LIVINGSTON, J. Had Corp any notice of the *supersedeas* having issued?

Foot, for the plaintiff. It could not have been obtained without notice to his attorneys; and we rely on that being sufficient to affect him; for a plaintiff is bound to know all that has been regularly transacted in his own suit. It is

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settled, that after *supersedeas*, obtained for want of being charged in execution, the defendant is not liable to a *ca. sa.* on the original judgment. *Perkins v.* [*269] *Proctor*, 2 Wils. 382. *Blandford v. Foote*, Cowp.

72. *Masters v. Edwards*, 1 Caines' Rep. 515. After production of the *supersedeas*, the sheriff would be liable to an action should he detain, and the same law exists against the plaintiffs, should they re-imprison. It is not correct to say, the debt due to the plaintiff is lost; for an action may now be brought on the original judgment. *Barker v. Braham and Norwood* is an authority to show that an action will lie both against a plaintiff and his attorney, for suing out an illegal *ca. sa.*, though it be so merely from informality. Eighty-one dollars cannot be thought excessive damages for near three months' false imprisonment.

KENT, Ch. J. There are several questions arising upon this case: 1. Whether trespass will lie at all for suing out execution against a defendant who has been discharged from custody by *supersedeas* for want of being charged in execution? If it will, then whether the plaintiff can sue, so long as the award of the execution remains good, and has never been set aside for irregularity?

1. The statute only says that a prisoner who is not charged in execution within three months after judgment, may be discharged from custody by *supersedeas*. The privilege of the prisoner from subsequent imprisonment upon the same judgment, is not founded upon the words of the act, but upon the construction and practice of the courts.^(a) 1 Caines' Rep. 515. The question is, whether a subsequent *ca. sa.* is to be deemed absolutely void, or is voidable only. I am inclined to think that the process is voidable only, and that process will not lie, although, perhaps, a *ca. sa.* sued out with a knowledge of all the facts,

(a) In England they have no statute requiring prisoners to be charged in execution, but the whole depends upon the rules of the court. 2 Crompt. 23; 2 Wils. 380; Bohun, 243; MS. note, by Kent, Ch. J.

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and of the rule of practice, might subject the party to an action on the case, and also expose him to be punished as for a contempt, in abusing the process of the court. In the case before us the judgment remains valid, and execution may go at any time against the property, and there is nothing upon record to show that the process by *ca. sa.* is in itself irregular. The general rule is, that false imprisonment *lies for arrest under process irregularly issued, but not for arrest under process erroneously issued. The irregularity, in such cases, seems, however, from an examination of the authorities, to have been apparent upon the face of the process itself, or upon inspection of the record. *Parsons v. Loyd*, 3 Wils. 341. *Turner v. Felgate*, 1 Lev. 95, and T. Raym. 73. *Philips v. Biron*, Str. 509. *Barber v. Braham*, 2 Black. Rep. 866, and 3 Wils. 868. And for this reason privileged persons, certificated bankrupts, &c., are not entitled to bring false imprisonment, although they may have been arrested. *Cameron v. Lightfoot*, 2 Black. Rep. 1190. *Tarlton v. Fisher*, Doug. 671. False imprisonment, it is said, will lie for arresting a person on Sunday: 1 Salk. 78. But this arises from the words of the statute, which declares the service to be void, (2 Black. Rep. 1195,) and that the party shall be answerable in the same manner as if he arrested without process. I have not been able to meet with any case that comes home to the present, in its circumstances, or that will apply, by any fair rule of analogy, so as to support the action. Trespass has been held to lie against assignees, under a commission of bankruptcy, even before their commission was superseded; but this was upon the ground that the commissioners had exceeded their authority, and that their proceedings were, consequently, *coram non iudice*, and void. *Perkins v. Proctor*, 2 Wils. 382, and also, to the same effect, *Smith v. Boucher*, Str. 993, and *Terry v. Huntington*, Hardres, 480. If a judgment be not *ipso facto* void, trespass will not lie for imprisonment under it. *Prigg v. Adams*, Carth. 274, Salk. 674. The case that most resembles the

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present, is that of issuing execution upon a judgment which has lain dormant above a year and a day. At common law, the plaintiff, in such case, was driven to sue out a new original, but the statute of 13 Eliz. c. 1, gave him a *sci. fa.* to revive the judgment. If, however, instead of bringing debt or *scire facias* upon the judgment, the plaintiff sues out a *ca. sa.*, the court, upon application, will set it aside *with costs. 2. Wils. 82, Barnes, 197, 206, [*271] 213. But it has been often adjudged, and it is well settled, that the party is not responsible in trespass for suing out the *ca. sa.*; for that the execution was voidable only, and was a good justification till reversed. *Patrick v. Johnson*, 3 Lev. 403. *Shirley v. Wright*, 1 Salk. 273. *Martin v. Ridge*, Barnes, 206. This case is extremely analogous to the present one, and the like rule of decision must apply to both. Although the plaintiff is no longer entitled to charge the defendant in execution on that judgment, yet, in each case, he may bring debt or *scire facias* upon the judgment, and charge the defendant in execution upon the new judgment to be had thereon.

2. But admitting that a trespass would lie, the plaintiff brings his suit prematurely, so long as the *ca. sa.* appears regular upon the record. He ought first to have applied to the court, and had the writ set aside as irregular; and in the particular case of proceedings, except by certain inferior officers beyond their powers, and whose proceedings are held to be *coram non judice*, I believe no instance can be found in which trespass was brought until application had been made to the court to determine upon the validity of the process, and to set it aside. Until that be done, the process will be a justification, and the court will not decide touching its validity in this collateral way. There may be circumstances existing, which might limit the interference of the court, upon the direct application, and induce them to set aside the process upon terms, and those circumstances cannot be examined into, nor the interference modified, in the present suit. One of the terms might have been,

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that no action of trespass should be brought. Such terms have been imposed by this court, on setting aside proceedings, and it is sometimes the practice in the English books. Barnes, 375. I am of opinion, therefore, for these reasons, that the verdict ought to be set aside.

LIVINGSTON, J. This action ought not to be encouraged. The judgment warranted the execution, and [*272] although *the plaintiff had been superseded, we have already determined that the object in providing this relief, was to compel the party to elect what process he would resort to, and that after a lapse of three months, and even notice of application for a *supersedeas*, the body might be detained on a *ca. sa.* Why, then, after an actual *supersedeas*, should all right of personal recourse be forever gone? The debtor is no more injured by an exercise of this election after his discharge, than after the expiration of three months. But, without further reasoning, it will be sufficient to say, that my opinion is founded on the reasoning of some cases decided in this court. I have, therefore, thought it unnecessary very minutely to examine the practice in England, although if it be permitted there, as it is, (Cowp. 72,) to have a *capias ad satisfaciendum* in a second action, brought on a judgment, after a discharge of this nature, why not sanction one in the first instance, without all this expense and delay? Would it not be more dignified to permit a thing to be done immediately, than to drive a creditor to a proceeding so circuitous and indirect, and for no other reason than because he has been so forbearing as to permit his debtor for a while to leave the walls of a prison.

Notwithstanding the determination in *Masters v. Edwards*, which was a departure from principles formerly adopted, we have not yet said that a party thus aggrieved shall have a remedy by action. We do enough, if, as was done in the last case, we set aside the execution. So long

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as this can be done, either here, or by a judge at chambers, it is not probable we shall have many complaints.

Upon the whole, as the judgment remained in full force, as the act is silent as to the effect of a *supersedeas*, as the obligation to pay is as great as ever, as the *ca. sa.* was only voidable, and not void; but more especially, to preserve a uniformity of decision, I think there ought to be a new trial, with costs to abide the event of the suit.

THOMPSON, J. The merits of this case are, I think, comprised within a very narrow compass, and the right of the plaintiff to recover in this action will depend altogether *upon the question, whether the exe- [*273] cution issued against him, is, in judgment of law, to be deemed void, or only voidable? If the former, it was a nullity *ab initio*, and could afford no justification; if the latter, it would afford a good justification until set aside.

I am inclined to think the execution must be considered violable only. That this court will relieve a prisoner charged in execution, after a *supersedeas* has regularly issued to liberate him from imprisonment, for want of being charged in due season, has been settled in the case of *Masters v. Edwards*, 1 Caines' Rep. 516. But whether such execution is to be considered void, or voidable, is undetermined. It appears regular upon the face of it; it is warranted by the judgment, and is to be avoided by some matter *dehors* the record, and which, I think, cannot be taken advantage of in this collateral way. A party justifying under the execution may thus be taken by surprise, and also deprived of the equitable discretion frequently exercised by courts, according to the circumstances of the case, in setting aside executions improperly issued upon terms, among which, that no suit for false imprisonment shall be brought, is often made a condition of the rule.

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I think there are cases somewhat analogous to the present, when the process has been deemed voidable. Thus, if an execution be issued on a judgment that has lain dormant for a year and a day, it is deemed voidable only; and, until reversed or set aside, is a good justification. 8 Lev. 408. An execution thus issued, is called, in the books, an erroneous process. 1 Salk. 273. And in the case of *Parsons v. Loyd*, 8 Wils. 845, De Grey, Ch. J., says, there is a great difference between erroneous process and irregular (that is to say void) process. The first stands valid and good until reversed; the latter is an absolute nullity from the beginning. The party may justify under the first until it be reversed, but cannot under the latter.

And in the case of *Prigg v. Adams and others*, 2 Salk.

674, an officer justified under an execution on a [*274] judgment *which, by an act of parliament, was void, and on demurrer, the question was, whether the judgment was so far void as that the party might take advantage of it in this collateral way, and it was held that it was not, but that it was only voidable by plea, or writ of error.

The result of my opinion, therefore, is, that in the present case the execution issued against the plaintiff was only voidable, and, until set aside, affords a good justification. The verdict must, of course, be set aside.[1]

SPENCER and TOMPKINS, Js., concurred.

New trial.

[1] Trespass lies for an arrest under a voidable process set aside by the court as irregularly issued. *Chapman v. Dyett*, 11 Wend. 81.

Reynolds v. Church.

REYNOLDS *against* CHURCH and DOUGLAS.

S. P. Especially if such defendant obtain his discharge from execution under the insolvent act, his proceeding under that law being a confirmation of the execution.

THIS case differed from the antecedent in one point only; which was, that the plaintiff, instead of being discharged from execution by the defendants, duly obtained, after a three months' confinement, his liberation under the 4th and 5th sections of the "act for the relief of debtors with respect to the imprisonment of their persons." The judge, on this account, directed a non-suit.

Van Vechten, in support of it, contended that the plaintiff, after treating the execution as good and valid, was estopped from saying the reverse. Besides, in consequence of the proceedings under the statute he was forever discharged from the judgment, which circumstance would distinguish this from the preceding case.

Foot, contra, insisted the execution was void *ab initio*, and could not be made good by any subsequent acts of the plaintiff himself.

Per Curiam. There can be no grounds for the application to set aside the non-suit in this case, for the reasons urged in the preceding cause. But in addition thereto, the execution being deemed voidable, the defendant must be considered as having waived the error, and affirmed the execution, by availing himself of his imprisonment under it, for the purpose of obtaining the benefit of the act for the relief of debtors with respect to the imprisonment of their persons.

Motion denied.

Kline v. Husted.

[*275]

*KLINE *against* HUSTED.

Special pleading in a justice's court is to be discountenanced. If in trover, before a justice, a justification be pleaded, which goes to the merits, and he determine that it amounts to the general issue, whereon a trial is had, in which it does not from the record, appear that the whole merits were not before the jury, the court will intend that they were, and affirm the judgment below pronounced, on the verdict rendered. All objections to a *venire* issued by a justice ought to be made before trial.

IN ERROR on *certiorari*, in this and two other causes, the following points were relied on. 1st. That the action being trover, and the defendant having justified by pleading a right of entry, under a lease, for rent-arrear, in consequence of which he entered, distrained and sold, (as it was lawful for him to do,) the justice ruled the plea to be equivalent to the general issue, and proceeded accordingly; 2d. That the court was held on the 12th of the month, and adjourned to the 22d, but the *venire* was tested on the 21st, when the court was not sitting, or, in other words, out of term; 3d. That the *venire* was directed to any constable of the county; 4th. That the cause of action appeared on the record to have arisen in the town of Hillsdale, and the trial was in that of Livingston; 5th. That in the oath stated to have been administered to the constable, the words "until they have agreed," were omitted; 6th. That in one cause no issue was joined; for, on pleading the justification, *oyer* of the lease being demanded, and not given, the justice went on and tried the cause, though the defendant abandoned it.

W. W. Van Ness, for the plaintiff in error. To warrant a *venire*, issue must be joined, for till then there can be nothing to try. This observation applies to the first and last objections, in neither of which does the return show a joinder. Even if we allow the special plea to be equivalent to the general issue, yet it would not justify the pro-

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ceedings adopted. On such occasion a *venue* is not awarded, but the party is driven to his demurrer, on which alone the goodness of the plea can be determined. It is not, however, conceded, that the judgment on the plea was correct, notwithstanding the *dictum*, that in trover, only the general issue of not guilty, or a release, can be pleaded. Because the special matter may be given in evidence under the general issue, it does not follow that such matter may not be specially pleaded. For instance, payment, or infancy may be pleaded; yet each may be given in evidence *under the general issue. In tro- [*276] ver, the true rule is, you must either traverse or deny the conversion, or confess and avoid it. Esp. Dig. 595. A variety of cases may be adduced, in which this principle has governed the matter pleaded. In *Thomson v. Clerk*, Cro. Eliz. 504, in trover for a conversion of goods in Nottingham, the defendant confessed and avoided, under a judgment in the Queen's Bench, and a *fi. fa.* thereon to the sheriff of York, who, at Wakefield, in the said county, by virtue thereof, took the goods in execution, and delivered them to him in satisfaction of the judgment. On a general demurrer, the plea was holden ill, not on account of its amounting to the general issue, but because it did not state where the Queen's Bench was held, or traverse the taking in Nottingham; and because the sheriff could not on a *fi. fa.* deliver the goods, but must sell. It is, therefore, to be presumed, that, had the plea amounted to a bar, it would have been otherwise. So in *Gomersale v. Wayts*, Cro. Jac. 255, a plea that the goods were taken for distresses under a *distringas*, on a plaint in a court *baron*, and sold, was overruled, merely because, on such a writ, the goods could not be sold. The same principle is found in *Brownlow v. Lambert*, Cro. Eliz. 716. From these authorities it is evident that matter which confesses and avoids the conversion may be pleaded if it be set forth in due form of law. On the second point, we insist that the *venue* was prematurely awarded. Till the opening of the

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court, and whilst out of term, as it may be called, the justice had no authority to direct one. The adjournment was, unto the day after the *venire* issued, before which time the magistrate had no authority to order it. In *Day v. Wilber*, 2 Caines' Rep. 134, I am aware it has been ruled, that when a party pleads, he waives all objections to the *venire*. 6 Res. *ibid.* 136. But the decision there applies to cases where the exception is taken by the party at whose request the writ is sued out. The inference, therefore, is, that he who does not pray the writ, may object. The direction also is to an officer who does not exist. There is no such person as a constable of the county. The law [*277] knows only constables of towns; and though a direction to a wrong officer may be cured, one to a non-existing officer is fatal. This cannot be called a matter of form, and, therefore, not within the act of 1801, (Act for the more speedy recovery of debts to the value of 25 dollars, 1 Rev. Laws, 491, s. 19,) which indeed, is no more than an extension of the statute of *joofails*. The fourth error relied on speaks for itself; and the fifth is expressly within the last resolution, in *Day v. Wilber*, which settles, that though a justice is not bound to set forth the oath administered to a constable; yet, if he undertake it, and misrecite, the judgment must be reversed. On the sixth exception something has already been said; but the justice was certainly wrong in proceeding to trial without an issue joined, merely because *oyer* was refused, when, as the demise was not pleaded with a *profert*, it does not appear to have been by deed; and if by parol it was not demandable.

Parker and *Foot*, contra, argued, that all defects in the *venire* and *venue* were cured by pleading in chief, according to the case of *Day v. Wilber*; and, as the decision of the justice upon the special plea was clear law, it must be intended the jury tried the facts set forth in the same manner as if they had been adduced in evidence under the

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general issue ; their verdict is, therefore, conclusive against the justification set up. The oath of the constable, they urged, might be rejected altogether, as mere surplusage.

W. W. Van Ness replied, the intendment of trial could not be made, as it was against the record, which stated that the defendant abandoned the cause.

THOMPSON, J., delivered the opinion of the court. This case comes before the court on *certiorari*. The exceptions taken to the return are, 1st. That the proceedings were in the county of Dutchess, and the whole cause of action stated to have arisen in the county of Columbia; 2d. That there was a special plea put in, and the justice went to trial without any replication, or issue being joined; 3d. That the *venire* is defective in being directed to a constable of the county.

The first exception, on examination of the record, does not, in point of fact, appear to be well taken. The action is in trover; the declaration not very formally, or technically *drawn, and much unnecessary matter introduced. But the plaintiff below alleges himself to have been in possession of the property, at Northeast Town, in Dutchess county; and that the conversion, which is the *gist* of the action, was at the same place. The declaration, we think, states the plaintiff's demand with all necessary certainty to enable the defendant to answer and defend, which is all that ought to be required in justices' courts.

With respect to the second exception, it is to be observed, that the plea purports to be a plea of justification, and without determining whether such a plea in an action of trover would be good on demurrer, it is enough, we think, to say, that the whole matter set up in the plea might have been given in evidence under the general issue. The defendant was, therefore, under no necessity to interpose a special plea; and all such pleadings, in justices' courts, ought to be dis-

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countenanced, as being calculated to mislead magistrates, and involve proceedings in their courts in all the technical niceties of special pleading. The defendant has, in his plea, detailed the facts which he relied upon in his defence, which amount, substantially, to a denial of the plaintiff's right to recover against him. This is sufficient, without requiring a special replication from the plaintiff. The parties went to trial upon the merits. The defendant was not precluded from any defence he had to make; the whole merits of the case, for any thing that appears on the return, were before the jury, and we must necessarily intend, because nothing to the contrary is shown, that the defendant below failed in supporting, by proof, the allegations contained in his plea.

With respect to the last exception, if it could have been made in any stage of the proceedings, it comes too late, and does not involve in it an examination of the merits of the case between the parties. The opinion of the court, therefore, is, that the judgment below be affirmed.

[*279] *BAKER and ROWLSON *against* R. and H. ARNOLD.

In an action by a *bona fide* holder of a note taken before due, against the maker, the consideration cannot be inquired into, if the instrument be not in its creation void.[1] The letters of an indorser may be adduced to contradict his testimony as to the time of his indorsing, and it is for the jury to determine whether his oath or letters are to be credited.

ASSUMPSIT by the indorsees against the makers of a note, for 830*l*., dated March the 31st; 1796, payable on the 31st

[1] Where a note is adjudged void by a court for the want, failure, or illegality of the consideration, it is void only in the hands of the original holder, or those who are chargeable with, or have had notice of the consideration; unless the paper be expressly declared void by statute. *Valett v. Parker*, 6 Wend. 615; *City Bank v. Barnard*, 1 Hall, 70; *Rockwell v. Charles*, 2 Hill, 499.

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March, 1799, with interest from thence, to Roswell Lombard, or order, with an indorsement to the plaintiffs in these words: "Pay the within note to Erastus Baker and Sylvester Rowson, value received, March 30th, 1799, Roswell Lombard."

On the trial, the handwritings of the defendants and payee being admitted, the plaintiffs there rested their cause.

The defendants, to establish that the indorsement was made after the note was due, and thus afford an opportunity of impeaching the consideration, by letting in their equities, called the indorser himself, who, after some objection as to his competence, was, on the authority of the former decision in this case, (1 Caines' Rep. 258,) received by the court. Lombard then testified, that before the instrument became payable, he sold it to one Holt, for Susquehannah lands, lying in the state of Pennsylvania, within the Connecticut claim; but that he did not then indorse it over, nor did he ever know that the note was in the hands of the plaintiffs, or that they had any interest in it till June, 1799, when he was called on by one Elmer, on behalf of the plaintiffs, with a request to indorse it, which he refused, and that he did not until the September after, upon a second application, yield to the persuasions of Elmer, a Mr. Pepoon, and one of the plaintiffs, by putting his name on the back of the note. This, however, he swore was done in blank, with a knowledge of the consideration on which he had parted with it to Holt, and that at the same time it was mentioned a suit had been commenced against the defendants.

The way being thus prepared for investigating what had passed from him when the note was given by the defendants, they called one Gardner, a subscribing witness to the instrument, and he deposed that the consideration was, like that *for which it had been indorsed, [*280] Susquehannah lands lying within the Connecticut claim, in Pennsylvania.

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To rebut this testimony, and impeach Lombard's credit, the plaintiffs gave in evidence the following letter to the defendants, signed by Lombard himself.

"Stockbridge, May 31, 1797.

Messrs. Richard and Henry Arnold,

"Gentlemen,—This may certify that I have sold the obligation which I held against you. I sold it to Mr. Jacob Holt, of Canaan, in Connecticut, and I have received a line from Mr. Holt, wishing me to transfer the obligation to Erastus Baker and Silvester Rowson, mentioning in the line that he has received property to the amount of the obligation, and transferred by me, Roswell Lombard."

They also produced the letter of the 4th of March, 1799, from the defendants to the plaintiffs, set forth in the former report of this case, (1 Caines' Rep. 259, 260,) and another of the 19th of April, 1799, still offering to settle on the same terms, but threatening, if they were not accepted, a defence which should prevent all recovery. The plaintiffs also produced a witness, who deposed that he was present when Holt disposed of the note to them, and understood from Holt and Lombard, and the defendants, the consideration, both for the transfer and making of it, to have been lands in Canada, a tract of which he had himself sold to the plaintiffs, who, by another person, proved that in the beginning of March, 1799, one of the defendants acknowledged the note to be an honest debt, and that he had then come to make provision for its discharge.

On the part of the defendants, Lombard was again called, and swore he never had said the note was given for lands in Canada.

The judge, on charging the jury, said the first question for them to determine was, whether the note was indorsed after due. That Lombard had sworn positively to this, but how far he was to be credited, was, under the circumstances of the case, for their determination, *as [*281] the fact, with respect to the time of indorsement,

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came within their province to determine. If they believed it to be before the note was due, the plaintiffs were entitled to recover, as the consideration could not then be impeached. If, on the other hand, the indorsement was after the day of payment, their verdict, should they be of opinion the consideration was Susquehannah lands, ought to be for the defendants.

The jury having found for the plaintiffs, application was now made to set aside the verdict on two grounds. 1st. On account of misdirection in leaving the date of the indorsement to the jury; 2d. Because the verdict was against law and evidence.

Woodworth, for the defendants, argued, that on the first point there could be very little hesitation, for, from the decision on the first appearance of these parties before the court in 1 Caines' Rep. 295, it appears the date of an indorsement is perfectly immaterial, and yet from this circumstance the jury were left to infer against the defendants, though the actual period at which it was done, lay, necessarily, within the knowledge of Lombard, and the insertion of the date may well be the act of the plaintiffs. As to the verdict, he said, it was against the weight of testimony, none of which went to impeach Lombard's credit.

Henry, contra, cited *Peacock v. Rhodes*, Doug. 633, to show that, in the hands of *bona fide* holders of negotiable paper, not void *ab initio*, the consideration was not inquirable into if the instrument was received before due; this, he contended, appeared from the dates of the defendants' letters to the plaintiffs, and the incredibility of Lombard's testimony, which stood contradicted by the indorsement, and his letter of May, 1797. That at all events, he had parted with the note before due, and the mere act of indorsing being only what ought to have been originally performed, equity would consider it as having taken place,

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and a court of law permit it, at any time, to be done.
Smith v. Pickering, Peake's N. P. Cas. 50.

[*282] *THOMPSON, J. The misdirection complained of, so far as I have been able to understand it, from the points made in the case, or from the argument of the counsel is, that the indorsement upon the note, and the certificate of May, 1797, which both speak a language directly contradicting the testimony of Roswell Lombard, were submitted to the jury as facts, in any measure, impeaching the veracity of Lombard, or the correctness of his memory. This objection appears to me altogether unfounded. It was deemed all important to the defendants, and the turning point in the cause, to ascertain the time when the indorsement was made, whether before or after the note became payable. Lombard, the indorser, swore he made it after the note fell due, though it purported to have been made before. It was admitted by the witness himself, that the indorsement was not in blank; that it was filled up when he signed his name; and, from inspection, I think it is pretty evident that the whole indorsement is his handwriting. Here, then, we have his oath one way, and his declaration in writing the other; and it would be a little extraordinary, if a jury were not permitted to contrast the two, in order to determine which was correct. Had the indorsement been in blank, it might have altered the complexion of the case. Is it not every day's practice to give in evidence declarations made by witnesses, at other times, inconsistent with their testimony, in order to impeach their credit? A man is bound to tell the truth at all times, whether under oath or not; and I should hardly suppose, that because the story was committed to writing, it would excuse the falsehood; and if not, it was certainly a circumstance operating against the credit of Lombard. If it was not true that he made the indorsement when it purports to have been made, his motives must have been fraudulent, and the indorsement antedated for the purpose of precluding the

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defendants from a just defence. If a man, coming into a court of justice, and thus testifying the facts which expose his own turpitude, does not render himself suspicious I am at a loss to say what would. His oath stands directly contradicted by his *own acknowledgment [*288] in writing in another particular. He swears positively and unequivocally, that he never knew or heard that the note was in the hands of the plaintiffs, or that they had any interest in it, or contemplated purchasing it, until after it became due; whereas he certifies as early as May, in the year 1797, that Holt, to whom he had sold the note, had written him a letter, informing him, that he, Holt, had sold it to the plaintiffs, and requesting him the witness, to indorse it to them. These are circumstances, in my judgment, tending strongly to impeach the credit of Lombard. But it was peculiarly within the province of the jury to determine the credit due to him, which they have done by their verdict. If Lombard was unworthy of credit, the verdict cannot be said to be either against law or evidence. It is admitted, that if the indorsement was made when it purports to have been, the consideration could not be impeached. My opinion, therefore, is, that the motion ought to be denied.

LIVINGSTON, J. I am neither dissatisfied with the judge's charge, nor with the jury.

The first was such as the testimony called for, and so far from thinking the verdict wrong, I should not, if on the jury, have consented to any other. It is probable they disbelieved, as they had a right to do, every word Lombard said. His conduct, throughout this transaction, discovers him to be a crafty, designing man. Although he sold the note as early as in May, 1797, yet, when he discovers he had omitted to indorse it, he makes a thousand difficulties, with a view, no doubt, of extorting a further consideration. At length he puts his name on it, and immediately after sets about defeating a title derived from himself. This is

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not all. He swears positively to his ignorance "of the note's being in the plaintiffs' hands, or that they had any interest in it, or contemplated its purchase until June, 1799." And yet two years before, he had written a letter, which is part of the case, informing the defendants "that Holt, to whom he had sold the note, had transferred it to [*284] the plaintiffs, and wished him to *indorse it." Such a wilful departure from truth in one particular, for it could not have been a mistake, warranted the jury in discrediting every other part of his testimony. It is impossible that a man who pretends to so perfect a recollection of the most minute and immaterial circumstances, and that after a lapse of several years, should have forgotten so important a fact; one, too, which he had communicated in writing to the defendants.

But were this a verdict against evidence, it ought not to be disturbed, because the merits are most clearly with the plaintiffs, and the defence is of the most unconscientious kind. The plaintiffs are innocent holders of this note. They obtain it near two years before it falls due, and for a full and valuable consideration. The defendants are immediately apprised of all these facts. They treat with the plaintiffs, and that long before its time of payment had expired, and offer them satisfaction on certain terms. Were the suit in the payee's own name, but for the plaintiffs' benefit, and all these matters had been disclosed, I would have protected their interests, and stopped every inquiry into the consideration, the same not being such as to render the note void in the hands of a third person. *A fortiori*, the indorsement, whenever made, should have been regarded, particularly in support of a just debt, as relating back to the time of its actual delivery to the plaintiffs. But this, it is said, would have been in derogation of the defendants' rights, who, if no actual indorsement took place until after the note became due, might impeach its consideration. This necessarily leads to an inquiry into the nature of the present defence; for, if such practice be correct in any

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state of things, which I do not admit, it ought not to apply to a case where the object of ascertaining the exact time of indorsement is to let in a defence against conscience, and founded in a violation of private faith. Although this court may have decided on the illegality of the consideration of notes of this description, and may not enforce their payment, in suits between the original parties, the obligation to pay, *in foro conscientia*, if the party has received value, *still remains. Such is the case here. [*285] The defendants have received full value in lands, which they have probably sold to a profit, or of which they, or their tenants, for aught that appears, may now be in the quiet enjoyment. It was not alleged or pretended that the consideration had failed, although seven years had elapsed at the last trial since the land had been conveyed to them.

There are circumstances in this case which look very much like a combination between the makers and payee of the note, to defraud the plaintiffs. The Arnolds first receive value for it from Lombard, who takes care to sell it to Holt. When they have thus both pocketed a consideration for this paper, and sent it abroad into the world, they lay their heads together for the purpose of rendering it a nullity in the hands of a third person. This ought not to be endured. The defendants have had two chances already; with my consent they shall not have a third.

KENT, Ch. J. The most material question of fact in this cause is, whether the note was or was not actually indorsed by Lombard before it became due? The indorsement purports to have been made on the 30th March, 1799, the day before it fell due; but to repel this evidence, the indorser testifies that it was not indorsed until some time afterward. He speaks positively as to the time of indorsement, and relates circumstances to confirm the accuracy of his testimony. The testimony on the part of the plaintiffs also shows, that the note was not indorsed at the time it

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was sold and delivered by Lombard to Holt, and by him to the plaintiffs; but it might still have been indorsed at the time the indorsement is dated. If the testimony of Lombard was unimpeached, it would be decisive; but there is one fact that materially affects the credit of his testimony. He testifies, in a very positive manner, that he never knew, or heard, that the note was in the hands of the plaintiffs, or that they had any interest therein, or contemplated purchasing it, until June, 1799; and yet, by a letter under his own hand, bearing date in 1797, and directed to [*286] the defendants, *he admits he had sold the note to Holt, and that Holt had sold it to the plaintiffs. This inaccuracy in his testimony, and of which he was clearly convicted, detracts greatly from his credibility. The circumstances relative to his testimony were fairly submitted to the jury, and the verdict may be considered as evidence that the jury did not give credit to his testimony. I think I should have drawn a different conclusion, but still the verdict ought not, on that account, to be disturbed. It is the peculiar province of the jury to judge and determine upon the credit due to a witness, when there are circumstances contradicting his testimony and affecting his credit. Upon this ground I am against a new trial.

SPENCER, J., gave no opinion, having been concerned.

TOMPKINS, J., concurred.

New trial refused.

 Lansing v. McKillip.

LANSING against M'KILLIP.

If two considerations, both of which are good, be alleged as the groundwork of a special agreement reduced to writing, both must be proved as laid, though the instrument say for "value received."

ASSUMPSIT, on a special agreement in consideration of a horse, and divers goods and merchandises, to deliver, for value received, forty dollars worth of merchantable boards.

At the trial the plaintiff adduced the subscribing witness to the note, who testified that the horse was the only consideration. Upon this the defendant moved for a nonsuit, insisting that the plaintiff was bound to prove all the several considerations, as laid. The judge, ruling to the contrary, charged in favor of the plaintiff, for whom the jury found. The application now was to set aside that verdict.

Orary, for the defendant. If a promise be made on two considerations, proof of one only cannot establish it; for it is to be presumed that the *assumpsit* was founded on both. *Leneret v. Rivet*, Cro. Jac. 508, cited Esp. Dig. 133. It is immaterial whether they be both good. *Bradburne v. Bradburne*, Cro. Eliz. 149, cited Esp. Dig. 139. The necessity of making the proof correspond with the declaration, is shown in *Bristow v. Wright*, Doug. 666. The form of the pleadings *substantiate the same principle; each consideration must be averred, and it is a settled rule that you must prove your averment.

Foot, contra. It was not necessary to state or prove any consideration. The instrument says(a) "for value received."

(a) In a deed these words import a consideration. *Jackson v. Alexander*, 3 Johns. Rep. 484. If a plaintiff declare on a note payable in goods, which specifies "value received," it is *prima facie* evidence, and puts the defendant

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Crary, in reply. In cases of promissory notes, and bills of exchange, the position may be correct. But even there it has been doubted. Kyd on Bills, 61, 62. The present is not a negotiable instrument, and therefore not within the rule.

SPENCER, J. If the averment of a consideration on a note like the one in this case was necessary, then the plaintiff, by averring a consideration which did not exist, has failed in his proof; for if two considerations be alleged as the foundation of a promise, both must be proved. Cro. Jac. 503, Esp. Dig. 133, 139. If, (a) however, the admission of value by this paper is of itself sufficient, then the averment of a consideration would be surplusage, and might have been struck out on motion, and therefore cannot vitiate. Doug. 666.

That the present is not a promissory note within the statute will not be disputed; it is, therefore, a promise which can only be enforced on the ground of a consideration; and though value is admitted to be received, it does not supersede the necessity averring the consideration, that the court may see that it is of that kind and nature to sustain the promise. Prior to the statute of 3 and 4 Ann. c. 9, no action could be maintained expressly on a note, even for the payment of money, without declaring on it as a special agreement, and setting forth the consideration. The case of *Carlos v. Fancourt*, 5 D & E. 482, contains the whole law on this subject; and there the court unanimously held, that in declarations on notes not within the statute, they were to be regarded as special agreements, and the

on showing there was either a failure of, or no consideration; but if the plaintiff declare on such a note, and state the consideration for which given, averring that it had passed, he must prove his averment, and the particular consideration paid. *Jerome v. Whitney*, 7 Johns. Rep. 321.

(a) "Part of the consideration fails; if part of the consideration, all the *assumpsit*." Per Haughton, J., in *Hungerford v. Harryland*, 2 Roll. Rep. 371.

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consideration was necessary to be set out. In my opinion, the defendant is entitled to a new trial.

THOMPSON, J. It is not pretended that the instrument in writing, which was given in evidence, is a note within the statute. And if not, I apprehend the terms for value *received, contained in it, will not, of themselves, imply a consideration, but that a consideration must be averred and proved. It is a general rule, that when a special agreement is the foundation of the action, and that agreement stated in the declaration, the contract must be proved as alleged. The plaintiff having averred two considerations, his proof ought to have squared with it. In the case of *King v. Robinson*, Cro. Eliz. 79, the court went much farther, and said that if the promise alleged be proved, yet if it appear to have been made on a different consideration than the one stated in the declaration, it will not support the action.

Where all the considerations alleged are good, all must be proved, for the promise shall be deemed to be founded on all these considerations. Cro. Eliz. 759. Esp. Dig. 139. I am therefore of opinion, that the proof was defective, and that the plaintiff ought to have been non-suited on the trial. The verdict must of course be set aside.

KENT, Ch. J. This being an action of *assumpsit* upon a special agreement, it was necessary to state a consideration, and the plaintiff has accordingly stated that the consideration for the defendant's promise was a horse, and divers goods and chattels; sold to him by the plaintiff.

If a plaintiff allege several good considerations, they must all be proved, for the promise shall be deemed to be founded on both considerations taken together.[1] The promise to pay, in the present case, boards to the value of 40 dollars, was founded, not singly upon the sale of the

[1] Where the agreement has been reduced to writing, no other consideration can be shown, than that mentioned in the written agreement. *Schermerhorn v. Vanderheyden*, 1 J. R. 139.

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horse, (and which we must presume was not estimated at that value,) but upon the sale of divers goods and chattels, as distinct articles from the horse, and which, when added to the value of the horse, amounted to the full consideration of 40 dollars. This rule appears to have been long ago settled, and repeatedly recognised. In *Tiedale's Case*, Cro. Eliz. 753, the court of C. B. held, that where a consideration consisted of two or three parts, and every one of them was valuable, the plaintiff was bound of necessity, to show the performance of every part thereof. And in the case of [*289] *Couletan v. Curr*, *Cro. Eliz. 847, the K. B. agreed, that if two considerations be alleged, and one of them be found false by the jury, the action fails. So again, in the case of *Leneret v. Rivet*, Cro. Jac. 503, the K. B. ruled, in arrest of judgment, that if the plaintiff declare on two considerations, he must make a good and sufficient averment of the performance of both. The only exception to this rule is, where both considerations are not good, but one of them insufficient or frivolous. Cro. Eliz. 149, 848. But that distinction can have no application to the present case, as the sale of the horse, and of divers goods and chattels, are considerations equally valid. The verdict, therefore, must be set aside for misdirection of the judge, with costs to abide the event.

TOMPKINS, J., concurred.

LIVINGSTON, J. This action being brought on a note by which the defendant acknowledges his having received value for the promise he makes, it was not, in my opinion, necessary to prove any consideration, nor should the defendant have been permitted to show that it was incorrectly set forth, unless he were able to impeach it on the ground of fraud, turpitude, or illegality. It is superfluous, as well as dangerous, to require proof of the consideration of an undertaking in writing, when a valuable one is acknowledged under the signature of the party himself. It is asking what rarely can be complied with. How sel-

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dom is it that the whole consideration appears on the face of a contract; or that even a subscribing witness knows any thing of it; or if he did, how easily might it escape the memory, or such proof be lost, by death or other accident? So long, then, as it is permitted to set up any unlawful consideration, it is all that can reasonably be asked, and no one can complain that his own acknowledgment is regarded as evidence, at least *prima facie*, of one that is fair and valuable. The motion to non-suit, was therefore properly overruled by the Chief Justice; for here was not only a consideration acknowledged under the defendant's hand, but his receipt of a horse actually proved. Under these circumstances, *it would be doing great in- [*290] justice to listen to the present application, merely because an additional consideration alleged in the declaration, which may be regarded as surplusage, and the want of which constituted no defence, could not be proved, or was disproved. No case has yet gone this length, and I should require a series of decisions to satisfy me of the propriety or necessity of so much strictness. The case of *Bristow v. Wright*, Doug. 640, is very different from the present. There the demise proved varied from the one stated in the declaration. That is, the contract itself, and not merely its consideration, was erroneously set forth. The case of *Eeneret v. Rivet*, Cro. Jac. 508, cited from Croke, settles nothing more than if two good considerations are alleged as conditions precedent to the defendant's liability, performance of both must be averred, which is too reasonable to have wanted the support of any authority. In *King v. Robinson*, Cro. Eliz. 79, it was proved that the defendant assumed to do what was alleged, and something more. This, too, presents the case of a variance between the contract laid and the one proved, and not only between the motives to it as alleged and proved. The note of this case in *Espinasse*, (Esp. N. P. 189,) is incorrect. I know not of a single decision, rendering it necessary, on a contract of this nature, to prove a consideration. We are not now ex-

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amining whether a *nude pact*, evidenced by writing, has ever been held to be bad; but whether, which is a very different question, a promise in writing, acknowledging the receipt of value, shall not, *prima facie*, be sufficient to support an action without proof of its actual consideration. I know it to be a general and wholesome principle, that contracts must be made on some consideration, and that *ex nudo pacto non oritur actio*; but the question still recurs, who is to prove, in a case of this kind, the nakedness of the contract, or its want of consideration? The same law, which requires this *quid pro quo* in a contract, does not demand an absolute equivalent, but is satisfied, in many cases, with the most trifling ground that can be imagined.

Why not then be content, in point of evidence, [*291] with a declaration under the hand of *the party, that he has received a valuable one, without indulging the useless curiosity of prying further into the transaction? Why so very careful of a defendant's rights as not to suppose him capable of judging for himself what was an adequate value for his promise? Would it not be more just, and better promote the ends of justice, that one who had signed an instrument of this kind should, without further proof, be compelled to perform it, unless he could impeach the validity on other grounds? It may be said that whoever asks the interposition of a court, must show a right to recover, founded on a valid contract. This is not denied, but does not settle the way in which this proof is to be made—whether the defendant's acknowledgment of value received shall be regarded as sufficient, or what other evidence shall be required. Of specialties, the considerations we know are not inquirable into in actions founded on them. And yet the reason assigned by Powell, (on Cont. 333,) for excluding this investigation, applies to all bargains in writing. In a specialty, says he, "there is a sufficient consideration apparent, namely, the deliberate will of the party who made the deed." Does the mere absence of a seal, require us to believe that this deliberate

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will does not exist in other written contracts? The truth is, that little or no deliberation intervenes between signing and delivering a deed. They generally take place, as near as two distinct things can, in the same instant. This deliberation, then, being formed antecedently to a delivery and even signature of a deed, ought, on the ground of reason alone, to be evidence of a consideration, as much in the one case as in the other. But without disturbing any of the distinctions, which for ages have existed between these contracts, no adjudged case can be found repugnant to my conclusion. That no actions were maintainable on promissory notes at common law, where, however, they were regarded as evidence of debt, on counts for money had and received against the maker, is admitted. This establishes what is not controverted, that notes like these must be declared on as special contracts, and their consideration set forth; but *we are still at liberty [*292] to settle what shall amount to proof of them. In the case of *Carlos v. Fancourt*, 5 D. & E. 482, I will only say, that nothing like the present question occurred. The plaintiff had declared on a note of hand, payable on a certain contingency, as on a note within the statute of Anne, and that it was not so was the single point determined. No latitude of expression, therefore, in which the judges may have indulged on points not before them, could have the effect of settling the law, even in England. Unfettered, then, by any decision, as to what shall be received as evidence of the consideration of notes of this description, I have little hesitation in saying that it ought never to be necessary to prove the consideration of a contract, although stated in the declaration, where a party has acknowledged in writing that it was made for value, in any other way than by a production and proof of the instrument itself; and that the defendant ought not to be allowed to show that it was made on any other, unless it be of a nature to destroy, or in any manner affect its validity. This is no more than is done in actions of trover, in which, although

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a loss and finding be alleged in a declaration, proof of neither is required : where, then, the extravagance of alleging any legal consideration to comply with the usual form of declaring, and letting it be inferred from the production of a note which admits on its face a valuable one? Good sense would suggest the propriety of going further, and saying that such a note might be declared on as specialty, without alleging any consideration, only leaving to the defendant the same right of investigating its legality or failure. Such an innovation, however, in the form of declaring, should not be introduced without much deliberation on the consequences it might produce. The plaintiff is, in my opinion, entitled to the *postea*. [1]

Verdict set aside, and new trial granted.

[1] In setting forth this consideration, it must appear to be legal and sufficient on the face of the declaration, or the defendant may demur; it must be set forth truly, as it will appear in proof, or the plaintiff must be non-suited, provided the objection be taken. *Vid.* 1 Hall's Super. Ct. R. 201. The whole of the consideration of the defendant's contract must also, in general, be stated; and if any part of an entire consideration, or of a consideration consisting of several things, be omitted, the plaintiff will fail upon the trial, on the ground of variance. 6 Conn. R. 176; 4 id. 196; id. 259; 1 Day's R. 10. *Vid.* also cases cited, 1 Am. Com. Law, 556, in text and notes. It is, however, sufficient, in general, to state so much of any contract, consisting of several distinct parts and collateral provisions, as contains the entire consideration for the act, and the entire act, which is to be done in virtue of such consideration; and the rest of the contract, which only respects the liquidation of damages, after a right to them has accrued by a breach of the contract, is matter proper to be given in evidence to the justice or jury in reduction of damages, but not necessary to be shown to the court, in the first instance, on the face of the record. In an action founded on fraud, it is unnecessary that the consideration should be set forth particularly. It is enough to say a valuable consideration was paid, and that the plaintiff satisfied the defendant, without any thing more. 9 Cowen, 22. Where a part of a consideration, or one of several considerations, is frivolous and void, it is sufficient to notice only the valid consideration, though if stated it will not vitiate the declaration; but no mode of pleading can enable a plaintiff to recover, where a part of an executory consideration is illegal. *Vid.* 1 Chit. Pl. 262, 263; 10 Wen. 314. And if, in addition to the true consideration of a promise, another is alleged, not supported by the proof, it is a fatal variance, and the plaintiff should be non-suited. *Vid.* 3 Wen. 374.

*JACKSON, *ex dem.* CLARK, *against* REEVES. [*293]

The first plain in the Catskill patent, is not at the junction of the Catskill and Katerskill, but commences at Catskill church. The four miles from the five plains mentioned in the Catskill patent, are four miles due north, south, &c., from the northern, southern, &c., extremity of the plains, *et seq.* (a) In running out patents, a line northward, &c., means a line due north, &c. Where a grant is susceptible of two constructions, that which is most favorable to government is to be adopted.

EJECTMENT for lands in the town of Catskill, claimed by the plaintiff under a patent to Helmer Jansen, dated the 15th of January, 1703, 1704, which, in 1733, escheated to the crown, and were, on the 22d of August, 1738, re-granted to John Lindsey.

The cause was tried in September, 1802, when the defendant set up a title under the Catskill patent, granted the 28th of July, 1688, and, to maintain it, contended that the first of the five plains mentioned in that patent began at the junction of the Catskill and Katerskill. He also insisted on an adverse possession, to support which, he relied on the recital in a lease for 20 years, granted in 1784, setting forth a former demise for the same period from 1771, and surrendered on taking the new term in 1784. On the part of the plaintiff, it was urged *à priori*, that the premises could not be covered by the Catskill patent, as the first of the five plains commenced at Catskill church, to which if the four other plains were added, and from the northern, southern, eastern, and western extremities of the whole, four lines, due north, south, east and west, were run,

(a) According to the true construction of the Catskill patent, its boundaries are to extend four miles distant in every direction from the five plains mentioned in the patent, so as to make its exterior lines correspond, as far as possible, with the sinuosities of the plains, and so that a line four miles long, extended from any part of the exterior sides of the plains, will touch some part of the exterior boundary of the patent. *Van Gordon v. Jackson, ex dem. Bogardus and others, in error*, 5 Johns. Rep. 440.

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the terminations to be closed by straight lines, which it was insisted was the true construction of the patent, the premises would be excluded, and therefore could not be, from the defendant's own showing, his right. Of the adverse possession, the plaintiff denied the recital to be any evidence.

The judge having charged for the plaintiff's construction of the patent, the jury found a verdict in his favor.

The application now was, to set it aside on account of the mis-direction of the judge, and because the verdict itself was against evidence.

The case was most ably argued by *W. W. Van Ness* and *Van Vechten*, for the defendant, and *Henry* for the plaintiff; but as it would be impossible to do justice to their [*294] *positions, without diagrams of the location they supported, and as the principles most relied on would be applicable to no other grant not worded exactly like the one in question, the decision of the court has been thought to contain all that need be reported.

THOMPSON, J. The lessor of the plaintiff claims title to the premises in question, under a patent to *Helmer Jansen*, bearing date the 15th day of January, 1703. It is admitted that the premises in question are covered by this grant, and the plaintiff has deduced a clear and undisputed title to himself under that grant. His right to recover is therefore undeniable, unless taken away by some older patent, or the defendant is protected by length of possession. The defence set up embraces both these grounds. I shall examine them in their order. In the first place, it is contended that the premises are covered by the grant, usually known by the name of the *Catskill* patent, bearing date the 28th of July, 1688. This being the oldest patent, it must first be satisfied, wherever the two come in collision with each other. It becomes necessary, therefore, to locate the *Catskill* patent. The description of the land as contained in the grant, is as follows: "A certain tract of land with

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the appurtenances, lying, situate, and being at a certain place called Catskill, in the county of Albany, on the west side of Hudson's river, and on the south and north sides of the creek or kill, consisting of five great plains, the first called Waihackeek, the second Wichquanachtekak, the third Pachqugack, the fourth Apiskawachkok, and the fifth Potick, together with the woodland adjoining to the said plains, extending four English miles round the said plains, that is to say, four English miles from the said plains eastward, four English miles northward from the said plains, four English miles westward from the said plains, and four English miles southward from the said plains." In the location of this patent two objects of inquiry present themselves: 1. Where the five great plains intended by the grant are; and, 2. The manner of locating the [*295] woodland adjoining them. *It is contended, on the part of the defendant, that the first plain is at the junction of the Catskill and Katerskill. If so, then upon any of the locations contended for on either side, the premises would be included in the Catskill patent. On this point the testimony is somewhat contradictory. Several very ancient witnesses were examined on both sides; those on the part of the defendant, tending very strongly to establish the first plain at the junction, and those on the part of the plaintiff as strongly contradicting it, by locating the first plain in another place. Thus, from these witnesses, some doubt and difficulty might arise respecting this part of the case. But there are certain facts, either admitted on both sides, or established by uncontradictory testimony, that appear to me to afford an irresistible conclusion, that neither of the plains intended by the grant could be at the junction of the Catskill and Katerskill. In the first place they are called in the patent great plains, and none of the witnesses pretend to prescribe the plain at the junction, as containing more than about two acres of land. Again, the junction of the two creeks is upwards of two miles distance from the other four plains, acknowledged on

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all sides, which renders the defendant's claim highly improbable. But, what I think puts an end to the question is, that in the first patent, in the year 1680, these plains are described as lying above the land of Eldert Degoy, which are admitted to be the lands now owned by Samuel Van Vechten, a part of which lie along up the Catskill and Katerskill. These circumstances I consider as affording unanswerable evidence that the first plain is not at the junction of the two creeks. The witnesses on both sides, who were examined as to this plain, might have been very honest in their testimony. From the very nature of the subject, the fact was to be established, in some measure, by reputation; and from several of the witnesses it appears that the location of the first plain has a long time been a subject of dispute, and it is not to be wondered at that different reputations should be in circulation on the question. The location of these plains was matter of [*296] fact for the jury, to be ascertained from all the light given them upon the trial; and they have, by their verdict, determined that neither of the great plains mentioned in the patent, is at the junction of the Catskill and Katerskill; with which determination I am fully satisfied. This point being settled, the five great plains must be taken as lying together upon the Catskill, in the manner contended for by the plaintiff, forming a very irregular figure. The next question, then, for examination is, the location of the woodland round these plains. On the part of the defendant it is contended, that the patent ought to be located in such a manner, that from any part of its out-bounds, a line of four miles would touch some part or other of the flats; or, in other words, that the plains should be considered as rolled out or extended four miles in every direction. This location is certainly impracticable, on account of the irregularity of the figure formed by the five great plains. The sinuosity of the exterior lines being such, that by such extension, many of the lines would interfere one with the other. Where the given object is a regular

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figure or base, no difficulty or absurdity will arise in locating a rolling patent. It is otherwise, however, when the base is irregular, like the one before us. If the terms of the grant were such that it was susceptible of no other location, we might be bound, from necessity, to adopt the one above mentioned. But I think that is not the case in the present instance. There appears to me to be a location more rational, more conformable to the terms of the grant, and free from any difficulty or absurdity in practice, and by which the patent will cover but about one half of the land it would, according to the construction contended for on the part of the defendant; and it is an established rule, that when a grant is susceptible of two constructions, that should be adopted which is most favorable to government. The enormity of this grant, according to the defendant's location, is much against adopting his construction; it will contain 57,000 acres of land, swallowing up five whole patents, and interfering very essentially with several others. This inconvenience is, indeed, in *some measure, experienced upon all the locations [*297] contended for; but less in proportion as a lesser quantity of land is included. Much stress has been laid by the defendant's counsel in support of their location, upon a survey of the outlines of this patent made by John Beaty, deputy surveyor general, in the year 1719, and who appears to have adopted the construction now contended for, as far as the same was practicable. This, it is said, being done by a public officer, must be considered an act of government, and entitled to great weight. For what purpose this survey was made does not appear, nor is it easily perceived. No instruction accompanied the warrant of council; no construction appears to have been given by government to this grant; and, no possible object could have been answered by it, as an act of government, except to serve as a guide to prevent any interference in subsequent grants. That this could not have been the object, however, is pretty evident, from the acts of government

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soon after; for in the year 1733, we find, by the proceedings under the writ of *escheat*, that Helmer Jansen died intestate, leaving no heir, by reason whereof the title to the lands contained in the grant to him, and of which he died seised, became revested in the crown; and, in the year 1738, were again granted to John Linsey, all which lands, according to the defendant's construction, and Beaty's survey, are covered by the Catskill patent. If Beaty's survey was intended as a guide to government in issuing subsequent grants, it is not probable that so recently thereafter a patent would have been issued for lands, comprised within the Catskill patent, according to Beaty's survey; I cannot, therefore, view this survey in any other point of light than as an *ex parte* act, or, at most, as the opinion of Beaty. Probably, however, he run according to the patentees, because we find him assuming one of the great plains to be at the junction of the Catskill and Katerskill, than which nothing appears to me more unwarrantable or less founded. This survey, therefore, I think not entitled to much weight or influence upon the present question.

[*298] *If the defendant's construction of the Catskill patent be rejected, the plaintiff's right of recovery is disentangled from every embarrassment with respect to paper title; because, upon no other possible construction can that grant be extended to the premises in question. It may, however, be proper to examine whether that patent be susceptible of any other, and what location; several have been suggested by the plaintiff's counsel, one of which contemplates finding a common centre of the five great plains, from thence circumscribing a circle round these plains, with a radius of four miles in length. I cannot adopt this location, although the one principally relied upon on the part of the plaintiff. There are no words in the grant necessarily implying that the interior line must be a circle. The only term made use of in the description of the premises, that looks like requiring a circular figure, is

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the word round, "together with the woodland adjoining to said plains, extending four English miles round the said plains." This term round may, however, grammatically, as well as in common parlance, be satisfied, by giving land on every side of the plains, let the exterior lines be either circular or straight. It is difficult, if not impracticable, to find a common centre to a figure so irregular as the one formed by these plains. It is impracticable with a chain and compass to run out a circle. It is true, you may from a given centre, run such a number of radii, as that a straight line from one to the other would very nearly approach to a circle, but the difficulty and inconvenience attending it, appears to me a sufficient objection to this mode of location, unless compelled to adopt it by the most direct and unequivocal terms of the grant. So far from that being the case in the present grant, I think it contains words which will exclude any location contemplating a common centre. This patent gives the five great plains, and then the woods round the same, extending four English miles from the said plains, which, as I understand the expression four miles from, means four miles exclusive of the plains, that is, beginning at the exterior part of the plains, and from thence running four miles. If a common centre be taken, and the four miles calculated from that, there would *be a diminution of that [*299] line equal to the whole extent of the plains, which would be contrary to the terms of the grant. When any monument whatever is given as an object to run from, the exterior part, and not the centre, is the place of beginning. This objection will also apply to that location which contemplates a square, formed from a common centre. The only remaining location which has been suggested, is the one adopted upon the trial, and which, from the best examination I have been able to give the subject, is, in my judgment, the one best warranted by the terms of the grant. This location is made by running lines of four miles in length, due north, south, east, and

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west, from the extreme northern, southern, eastern, and western parts of the plains, and closing those lines from the extremities by straight lines. This mode appears to me to be supported by legal principles, and will give effect to every part of the description of the premises contained in the patent. The great and leading requisites in the location of every tract of land, are to have fixed places to start from, courses and distances given, and, closing the exterior lines, a recurrence to the description in the grant is again requisite, to see whether it furnishes these data. The five great plains are given, "together with the woodland adjoining the said plains, extending four English miles round the said plains, that is to say, four English miles from the said plains eastward, four English miles northward from the said plains, four English miles westward from the said plains, and four English miles southward from the said plains." The given object to start from here is the plains; the distance to run is four miles; the courses are northward, southward, eastward, and westward; and it is a settled rule of construction, that when courses are thus given, you must run due north, south, east, and west. The place of beginning must be at the exterior part of the plains, because the distance is four miles from the plains, which, as I have before observed, must mean exclusive of them. By this process, then, the four corners of the tract are ascertained. These corners [*300] must be closed by lines of some description in order to satisfy the terms in the grant, because the woodland is to lie round, that is to say, on every side, of the plains; and when two objects are given, and a line to be run from one to the other, no rule can be more proper than to run a straight line. By this mode of location, it is admitted that the premises in question will not fall within the Catskill patent. The only remaining question for consideration is respecting the adverse possession set up against the plaintiff's right of recovery in this action. The possession of Abraham Van Gordon, who took a lease un-

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der the Catskill claim, in the year 1784, must be deemed adverse to the plaintiff's title. This, however, is not a sufficient length of time to protect the defendant. It is contended, also, that Johannis Van Gordon, the father of Abraham, was previously in possession under the same title, and the recitals in the lease to Abraham, of Johannis having taken a lease in the year 1771, have been in some measure relied on to establish the fact. This lease has justly been made the subject of some severe criticism by the plaintiff's counsel; it is enough, however, to observe, that the recitals are no evidence in the parties' own favor, and therefore afford no proof of the existence of a lease to Johannis Van Gordon. The parol testimony respecting the possession of Johannis is vague, uncertain, and contradictory. The characters of some of the witnesses have been impeached, and the matter involved in some doubt and obscurity. The question of adverse possession was a subject proper for the determination of the jury. The whole matter was fairly submitted to them, and the verdict is, I think, with the justice of the case.

My opinion, therefore, is, that judgment ought to be given for the plaintiff.

LIVINGSTON, J. It is not easy to pronounce this a verdict against evidence, as it regards either the defendant's possession, or the location of the first flat or plain mentioned in the Catskill patent, both of which the jury have found against him. There was much and contradictory testimony on both points. In such cases we cannot disturb a verdict, without encroaching on an essential prerogative *of a jury, which is to ascertain the degree of [*301] credit due to different witnesses. With respect to the first flat, I should, if on the jury, have decided as they did. The survey of Beaty proves little more than that at an early period the flat at the junction of the Catskill and Katerskill was shown to him as such. This survey being made for those whose interest would be promoted by this

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location, it would not be difficult, at a time when land was not of much value, for the patentees first to talk of this as the first flat, and then procure others who would be willing to show it as such. Government paid no attention to what was going on, and those who might have been interested in fixing the flat elsewhere, may not have known when the survey would be made. As to the surveyor himself, it is not very probable he took uncommon pains in deciding where it lay. He was acting under the immediate direction of the patentees, and must have known that if the lines run were not conformable with their boundaries, it would be their own folly, and that neither the public nor strangers could be prejudiced by it.

The plaintiff's witnesses, who, in general, are very aged men, declare they never remember any flat at the junction of these kills. From this and other circumstances, particularly the distant position of this spot from the other flats, and that they are described in the first patent as lying above Eldert Degoy, I cannot help thinking the plaintiff's location the most correct. I am as little inclined to send the cause back to have the question of possession re-examined. Whatever doubts may exist on this point, they are not so great as to require a further investigation, or to warrant a conclusion that the jury did wrong.

The only important point, therefore, according to my view of this cause, arises out of the judge's charge. If his opinion on the defendant's construction were incorrect, considering that the question on which it was given involved the great merits of the controversy, a new trial must be the consequence; but before this be done, we must be satisfied that there is no other way of locating [*302] or surveying the Catskill patent, than the one suggested by the defendant, who insists, "that from every part of its external bounds, a line of four miles should touch some part or other of the exterior of one or other of the flats, and should never be farther from, or nearer to, the plains." In this way of laying out the

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patent, it will contain 57,000 acres. The objections to it are strong.

If the first and second patents, between which is an interval of only eight years, are compared, we are astonished at the difference of their contents on the defendant's principles. The first comprises a small tract whose circumference was, by estimation, only four English miles, which would contain only 640 acres. There are no words in the second, from which can be inferred an intention of the patentees to ask, or of the government to grant, a single acre more than passed by the former. The first grant was to Elizabeth Salisbury, in trust for the children of Silvester Salisbury, and to Martin Garretson. The estate, as it respects the children of Salisbury, not being thought sufficiently definite, a new patent is obtained for the purpose of more certainly limiting the estate, than was expressed in the first. If so, and no extension of limits were in view, it is a reason for examining the defendant's pretensions with more than usual severity. A grant had been obtained from the Indians in 1678. In less than two years after a patent issues. At that time the patentees must well have known what they had purchased from the Indians, or intended to ask of the government, and with this knowledge, we find them content with a tract containing only four miles in circumference. Surely, after this understanding and exposition of their rights, they should not be indulged, without very conclusive reasons, in an interpretation so very variant from the first; especially, when, instead of alleging that the first grant contained less land than they were entitled to, a different motive is stated for asking a confirmation. Unless, therefore, it be utterly impracticable to locate this patent in any other way than the *one which has been already mentioned, I [*808] should be opposed to it, on the ground of its extravagance, and its being manifestly either against the sense of the parties themselves, or a surprise and deception on government.

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But independent of any rule which may be applicable to the present case, as drawn from the conduct and contemporaneous sense of the patentees, it is a general rule of law that in the exposition of governmental grants, that construction, when the terms are inexplicit, shall be adopted which is least favorable to the grantee. No one will pretend to say that the location of this patent is free from difficulty, nor that the defendant's interpretation of its boundaries is not the most extensive and advantageous for him that can be devised.

It is admitted, that to run the outline on this principle, if not impracticable, would be a work of uncommon labor. This is something against the principle itself. Government would hardly think it necessary to impose on the patentees a labor so unusual, for no patent, perhaps, ever issued under which a similar, or circular location was necessary. It is true, some surveyors admitted the practicability of running out the patent in this way, but its being merely so, with infinite labor, is no great argument in favor of that mode alone being correct. If surveyors had not sworn to its practicability, I should entertain very strong doubts whether it were possible, with any pains whatever, to survey this tract so as exactly to correspond with the defendant's location.

Beaty's survey, unless possessions under it had been acquiesced in, is not worth much. Such acts generally are *ex parte*, and cannot bind the government or third persons. It is evidence of one thing only, that the patentees were determined to lose nothing which the patent, by any possible construction, could embrace. So far from government assenting to this extravagant location, patents without number have been granted for lands, and which are possessed accordingly, within what are now pretended to be [*804] the bounds of Catskill. It is no answer to this objection, that even on the plaintiff's construction this is the case. This only proves that the plaintiff may be willing to allow that the patent contains more land than it

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really does, so that it does not interfere with him, but not that either construction is right. Still less is the difficulty satisfied, by asserting that patents frequently interfere with each other. This must sometimes happen, but can an instance be mentioned in which entire tracts have been granted within the limits of a former patent? If this, with the acquiescence of the Salisburys to the possession under these patents, with Garretson's being a patentee in one of them, and the Indian deed to Outen Bongert, executed before Garretson, in 1684, be not regarded as a contemporaneous understanding of government and of the parties, I hardly know what is to satisfy us of such an exposition. Upon the whole, the defendant's construction appears to me so very extravagant, so contrary to the sense of the original parties, so much at variance with other acts of government, and so extremely difficult to carry into effect, that I think the judge was right in not adopting it. It cannot, therefore, be very necessary to examine either of the other constructions, or whether the right of one was adopted at the trial, for even if the judge were mistaken in his opinion as to the true mode of location, if the premises are not within the patent, according to the bounds as set up by the defendant, it can be of no service to him to grant a new trial. Here, therefore, I shall only say, that the opinion expressed to the jury was full as liberal as the defendant had a right to expect, and probably leaves within the patent a much more extensive tract than it was intended to grant, or than the expressions used necessarily comprehended. But of this error, if it be one, the defendant has no right to complain. His motion, therefore, for a new trial, must be denied.

KENT, Ch. J. Two questions are raised upon this case : 1st. As to the construction of the Catskill patent ; and, 2d. *As to the length and effect of the ad-verse possession of the defendant. [*305]

1. There cannot be much doubt, I apprehend, but that

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the first of these five great plains was at the church, as contended for by the plaintiff, and not at the junction of the Catskill and Katerskill, as asserted on the part of the defendant. In addition to the weight of traditional information, the words in the elder Catskill patent locate the plains on the Catskill creek, above the land of Eldert Degoy. The patents also speak of five great plains, and there is no evidence that there ever was anything like a great plain at the junction of the two creeks. This is a decisive fact on the subject, and assuming it, then, as correct, that the plains are to be located at the Catskill church, and upwards, the question is, how the woodland adjoining the plains is to be laid out. The plains appear to have been considered as the substantive part of the grant, and the woodland as an appendage merely, still the plains is granted, and the only difficulty is as to the mode of location. Several modes of location have been presented, and perhaps none of them altogether free from objection. The woodland is to adjoin the plains and to be round them, and to extend four miles in each direction from the plains. In the elder patent the woodlands are not so particularly described as in the younger, and yet the latter professedly intended merely to confirm the grant of the land contained in the former patent, and which description was taken from the original Indian deed of 1678. The first patent and Indian deed speak of woodland for outdrift for cattle, containing by estimation, in circumference, four miles. A circumference with a radius of four miles from a common centre of the plains will best comport with the words of the patents, in circumference, or round the plains. Nor is this boundary altogether unknown, for the northern line of the state of Delaware, "*si parva magnis*," is ascertained in the same manner by a circle, whose centre is the middle of the town of Newcastle. In the case of *Penn v. Lord Baltimore*, 1 Ves.

444, one question was about drawing part of a
[*306] *circle about the town of Newcastle, and Lord Hardwicke held, that the centre must be a mathe-

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mathematical point from the middle of the town, as nearly as the same could be computed, and that such a mode was the fairest way, for otherwise, the exterior line would be too far in some parts of it. But this plan will not strictly answer all the words of the description, for the line is in each direction to be four miles from the plains, and the circumference of the circle might be only half that distance in some parts of it. There are some reasons why I should prefer the first mode contended for by the plaintiff at the trial, and that is, because it interferes the least with the surrounding patents, as it takes in the least quantity of acres, and because, in cases of such vague description, the patentee should take the construction the least favorable to an extension of his grant. But the objection to this mode is the same as that of the circle; the exterior line will not extend four miles in each direction from the plains, and it does not, like the circle, comport with any of the words in the description. The principle of location adopted by the judge at the trial, seems to correspond more nearly with the words of the grant. It goes four miles from the plains in each direction, and it may be said and understood well enough in common language, which the patent intended to use, to be round the plains. The difficulties that might apply to this location, if the plains were of different positions and shapes, is immaterial, for we are to adopt a construction that will best comport with the subject matter before us as it actually exists. The idea of rolling out the patent to the extent of four miles from every part of the plains, is literally impracticable, and when so modified as to be practicable, it would give too difficult and inconvenient a shape for location, and in a case of a description vague and doubtful, it would be stretching the grant over all the surrounding patents to an unreasonable degree; a construction more convenient and practicable, better answering the words of the grant, more favorable to the rights of the crown, and to the security of adjoining patents, ought to be preferred:

*And it is not essential that we should abso- [*307]

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lutely decide which of the other modes of location ought to be preferred, since either of them would exclude the premises from the Catskill patent. If it was necessary, however, to adopt a specific location, I should incline to adopt the location which was preferred by the judge at the trial, as least liable to objection, and most comporting with the grant.

2. The next inquiry is as to the adverse possession set up by the defendant. In the first place, it ought to be observed, that the lessor of the plaintiff deduced a regular and complete title to the premises. The first decisive evidence of adverse possession in the defendant, was by the lease of 1784. The recital therein of a former lease cannot be evidence of such a lease, as against the plaintiff, and as to the prior possession by Johannis and Abraham Van Gordon, the credibility of the testimony, as to the tenure of that possession, has been passed upon by the jury, and I see no good reason to question the correctness of their conclusion. On this point I think the verdict ought not to be disturbed, and that judgment ought to be entered for the plaintiff.[1]

Postea to the plaintiff.

[1] As to construction of grants, see Waterman's Am. Cl. Dig., vol. 2, tit. Grants.

PALMER and others *against* MULLIGAN and others

The Hudson is a public river, above tide water, *ut sembla*. An action will not lie for diverting the water of a river from its usual course, by erecting a dam for mills above the mills of another, if sufficient water be left to work the lower mills, though, in consequence of such erection, it be necessary to run the mill-dam of the lower mills further into the stream, and the difficulty of getting logs to the lower mills be increased so much as to require one hand more for every 25 logs. Where persons have an equal right to erect mill-dams on a river, the rubbish which comes from a newly erected upper dam, to an old lower dam, though it be an inconvenience to the lower of about 250 dollars a year, will, if a jury have found in favor of the defendant, and it appear that the floating rubbish of the river be lessened by the erection of the upper dam, be *damnum absque injuria*. No new trial will be allowed on account of newly discovered testimony, if it appear that it might have been procured on the first trial.

THIS was an action on the case for erecting and continuing a nuisance to the plaintiffs' mills and dam, situated upon the river Hudson, at Stillwater, in the county of Saratoga, by building above the said dam, and thereby directing the water from its ancient and accustomed course, and from the mills and dam of the plaintiffs, in consequence whereof they had not a sufficiency of water for working.

The declaration set forth other *gravamina* in obstructing the rafting of timber into their dam, which was used as well to keep logs to be sawed, as to collect and retain water for working their mills; in also opening the sluiceway *of the defendants' dam, and causing the rubbish collected therein to be carried into that of the plaintiffs, by means whereof it was choked up and rendered useless, so that they lost the benefit and advantage of their mills.

From the evidence at the trial, it appeared that the plaintiffs' mills were erected on the first settlement of that part of the country, about 40 years ago, upon their own ground, and were fed with water by a dam run out into

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the river. That at their first building they consisted of a grist and saw mill, which, after being burnt down, were within a year rebuilt on the same spot. That after this, the saw mill was a second time consumed by fire, and though the grist mill (on which point there was a small contrariety of testimony) was worked from time to time, the saw mill was not reconstructed till seven or eight years afterwards. A year or two before this period, the defendants erected their mill and dam, about two hundred yards above those of the plaintiffs. That the unavoidable consequence of the dam of the defendants was to oblige the plaintiffs to run theirs further out into the stream; but even then, the current was so turned off into the river, as necessarily to increase the difficulty of bringing timber into the saw mill of the plaintiffs, insomuch that it was impossible to avoid losing a great many logs, or reclaiming them at a considerable expense, to obviate which the defendants had, when applied to by the plaintiffs, refused permission to have a way made through their dam. That the rubbish from the defendants' mill, which it was more difficult to clear at low than high water, was a continual inconvenience to the plaintiffs, who sustained an injury of about 8 shillings per day, exclusive of an increase of labor, which, since the erection of the defendants' dam, required about one hand more to every 25 logs than was formerly necessary to get them in.

The jury finding in favor of the defendants, application was now made to set aside that verdict, as being contrary to the testimony adduced, and on a discovery of [*309] *new testimony, which it appeared might have been obtained on the first trial.

Emott, for the plaintiffs. On the first point stated, and upon which we intended to rely, the mere reading the case shows there can be no dispute; but the defendants mean to contend that the mills and dam of the plaintiffs being on a public river, are in themselves public nuisances,

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and, therefore, the obstruction to them does not give any right of action. To prove the suit may be maintained, it will be necessary to establish that the Hudson is not a public river, in the sense which will make these mills a nuisance. For if it be one of such a nature as to permit the plaintiffs to acquire property in the bed of it, their mills and dam cannot be nuisances. It is laid down in the case of the Fishery of the Banne, Davis, 56, that there are two kinds of rivers, navigable, and not navigable; the former extending as high as the sea ebbs and flows, and belonging to the king; the latter being such where the sea does not ebb and flow, and belonging to the land-holders on each side. This exactly answers the description of the Hudson where the mills in question are erected; for at Stillwater there is neither flux nor reflux of the tide. We find the doctrine in Davis confirmed in the treatise of Lord Hale, *de Portibus Maris*, Harg. Tracts, 5.

SPENCER, J. Has not the legislature granted islands above the site of these mills, and by that shown that they consider the Hudson to be a public river?

Emott. Where they have done this, the river has formed the boundaries of the adjoining patents, which have been granted to the river. Otherwise the common law prevails, and that was the very reason which induced the legislature to declare that certain rivers coming within the description above given, of private rivers, should, notwithstanding, be deemed highways. 1 Rev. Laws, 601, 602, s. 34. But although we claim property in this river, we admit the public have a right to it for all the purposes of navigation. Harg. 6. We do not insist on the power *to [*310] stop up the river. That, for the convenience of the people at large, is open; but this does not impair our right of property against individuals. Admitting the Hudson to be a public river, all erections on it are not to be considered nuisances. They can be deemed so only

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under the idea that a public river is a highway. Buller, J., observes, in *Boll v. Herbert*, 3 D. & E. 288, "no two cases can be more distinct. In the latter, if the way be foundeours and out of repair, the public have a right to go on the adjoining land; but if a river should happen to be choked up with mud, that would not give the public a right to cut another passage through the adjoining lands." To make the mills and dam nuisances, they must, allowing the river to be public, narrow the river so as to impede the navigation; "and this is matter of fact. It is not every building below low water mark that is *ipso facto* in law a nuisance; for that would destroy all the keys that are in all the ports in England." Per Lord Hale, in *Harg. Tracts*, 85. The grants to erect wharves beyond low water mark, are proofs that so long as the navigation is uninterrupted, a building, even on the public river, is not a nuisance. At all events, our nuisance will not justify theirs. It may, however, be said, that the defendants are as well entitled to run out a dam from their shore as we from ours. This, with some qualifications, is true; for it must be so done as not to injure us in the accustomed use of the water. In *Brown v. Best*, 1 Wils. 174, in an action for diverting a water-course which arose in the defendant's own grounds, the plaintiff declared simply on his possession of the place to which it used to run, and the court held it good, for the defendant could not divert so as to interrupt the ancient enjoyment of the stream. The same principle is recognized in *Duncomb v. Sir Edward Randal*, Hettley 34.(a) To maintain the action it is not necessary that mills should appear to be ancient. That is requisite only when the water belonging to another is prescribed for.

Palms v. Heblethwait, Skin. 65. "If a man," [311] says Lord Hale, "erect a mill on a watercourse *running through his land, he may bring his action for diverting the stream, and not say *antiquam molendinum*."

(a) The book is mispaged, for though printed 34, it is 33.

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Cox v. Mathews, 1 Vent. 237. The same doctrine is laid down in *Rutland v. Bowler*, Palm. 290, and Hutton, 100. For by the mere erection of the mill, the plaintiff acquired a right which even the purchase of the land in which it stood would not take away, as a right to water is not extinguished by unity of possession. *Shuny v. Pigot*, 3 Bulst. 339. Was it necessary even to presume a grant for the stream, it ought, after a use, like ours, of forty years, to be presumed. Thirty years' enjoyment of a highway is said to warrant one. Bull. N. P. 75. In the case of lights, twenty years' possession have been held enough. 3 D. & E. 159, *Darwin v. Upton*, cited there. It may, however, be thought, that because the mills were burnt down, the defendants had a right to divert; but even pulling down the mills by the plaintiffs themselves would not have impaired their title to the water; they might even in such a case prescribe. *Palmis v. Heblethwait*, as reported in 2 Show, 261. The same position is laid down in *Luttrell's Case*, 4 Rep. 86. 87. The present, therefore, is still stronger; for the mills were burnt down.

Foot, contra. The lapse of time before the plaintiffs attempted to rebuild their mills, is alone an answer to their claim of right. The convenience of a new country demands that mills so long left unrebuilt should be deemed to be abandoned, and the right to the water relinquished. The authorities cited apply to mills on private streams. The Hudson, at Stillwater, is a public river.

SPENCER, J. A motion has been made on the part of the plaintiffs for a new trial on two grounds: 1st. That the verdict is against the weight of evidence; and, 2d. On discovery of new evidence.

The plaintiffs' witnesses generally accorded in saying, that the only injury to the plaintiffs by the erection of the defendants' dam is this, that it occasioned additional labor and expense to the plaintiffs to carry logs into their dam.

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None of them pretend that there has been any diminution [*812] version of the water since the defendants erected their dam, which was seven or eight years ago. Some of the plaintiffs' witnesses think the rubbish increased in the plaintiffs dam, since the erection of that of the defendants; others think it not increased.

It is conceded that the plaintiffs and defendants own the lands respectively on the banks of the river, opposite their mills and dams.

Whether the Hudson river be considered as a public highway, or the bed of it as belonging to the owners of the adjacent shores, will not, I think, vary the result. I cannot, however, but consider it as a common highway; independent of its being navigable with small craft and rafts above the place in dispute, the legislature have constantly considered this river as public, and common to all the citizens of the state above tide water, and above Stillwater. They have granted islands in this river at Glens Falls, and in the town of Greenwich, in Washington county.

The act declaring certain waters highways not extending to this river, has been considered as impiedly sanctioning the idea that it is not public property; I should draw the contrary inference; for if the legislature have declared such rivers as the Conhocton, the Unadilla, the east branch of the Chenango, and the great variety of other inland waters, public highways, as necessary to the public convenience, it must have been taken for granted that the Hudson river was already a public highway, and needed not an act declaring it to be so. If, then, this river is to be deemed a highway, the erection of both dams are nuisances, and it is questionable whether the plaintiffs can, without right or title, complain that the defendants' nuisance is injurious to their nuisance; but on this point it is unnecessary to express an opinion.

If this river be considered as private property, belonging to the owners of the adjacent shores, the plaintiffs cannot maintain their action from the evidence before us; because

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there is no pretence of the waters being diverted; the use of the plaintiffs' property is rendered less commodious, *by the defendants' dam. The act itself in [*318] erecting the dam, on the principles contended for by the plaintiffs' counsel, was a lawful act; and though in its consequences slightly injurious, the plaintiffs are remediless. It would have been as tenable ground if the plaintiffs had declared on the loss of custom to their mill, by the erection of the defendants; it is a *damnum absque injuria*. The erection of dams on all rivers are injurious in some degree to those who have mills on the same stream below, in withholding the water, and by a greater evaporation in consequence of an increased surface; yet such injuries, I believe, were never thought to afford a ground of action. In any and every view of the subject, the verdict was legal and just. The second ground of the motion does not alter the case, even if the testimony could be considered as newly discovered, and that there had been no laches on the part of the plaintiffs; but, for aught that appears, John White, one of the plaintiffs, knew of this testimony, and neglected to procure it.(a) I am averse, however, to putting it at all on that ground; the testimony discovered is wholly irrelevant and immaterial. In my opinion the plaintiffs take nothing by their motion.

LIVINGSTON, J. In determining this cause, I am willing to admit that the erection of the plaintiffs' mills and dam is not only no nuisance or obstruction to the river, but a public as well as private benefit. Still I am not satisfied of their right to recover. Whatever their pretensions to build a dam and mills adjoining their own land may have been, it must be conceded that, as far as the public are concerned, the defendants had the same right opposite their ground, provided it could be done without injury to the navigation of the river. This is not pretended to be

(a) See *Dow v. Smith*, 1 Caines' Rep. 174. n.(a.)

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the case; but as the plaintiffs' mills were first erected, it is said, that if the defendants have any right of this kind, they must so use it as not to injure their neighbors. Without denying this position, which is indeed become a familiar maxim, its operation must be restrained within reasonable bounds so as not to deprive a man of the [*814] enjoyment *of his property, merely because of some trifling inconvenience or damage to others; of this nature is the injury now complained of, so far at least as it is supported by proof. It is not pretended that the water is diverted, or that less business can be now done at the plaintiffs' mills than formerly, but they are obliged to bring their logs a very little farther round in the river (in order to get them into the dam,) which is the principal, if not only inconvenience they are exposed to by the defendants' conduct. Were the law to regard little inconveniences of this nature, he who could first build a dam or mill on any public or navigable river, would acquire an exclusive right, at least for some distance, whether he owned the contiguous banks or not; for it would not be easy to build a second dam or mound in the same river on the same side, unless at a considerable distance, without producing some mischief or detriment to the owner of the first. Were this not permitted for fear of some inconsiderable damage to other persons, the public, whose advantage is always to be regarded, would be deprived of the benefit which always attends competition and rivalry. As well, therefore, to secure to individuals the free and undisturbed enjoyment of their property, as to the public the benefits which must frequently redound to it from such use, the operation of the maxim *sic utere tuo ut alienum non ledas* should be limited to such cases only where a manifest and serious damage is the result of such use or enjoyment, and where it is very clear indeed that the party had no right to use it in that way. Hence it becomes impossible, and, indeed, improper, to attempt to define every case which may occur of this kind. Each must depend on its own

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circumstances; and the fewer precedents of this kind which are set the better. Confining myself, therefore, strictly to the case before us, my opinion is, and the jury probably proceeded on that ground, that the plaintiffs proved no injury, or one so remote and 'insignificant, as not to justify their insisting on an abatement of the 'defendants' dam, or damages for its erection.[1]

[1] Where the water of a river is divided by an island, so that only one-fourth of the stream descends on one side of the island, and the residue on the other, the owner of the shore where the largest quantity of water flows is entitled to the use of the whole water flowing there; and the owner of the other shore has no right to place obstructions at the head of the island to cause one half of the stream to descend on his side of the river. *Crooker v. Bragg*, 10 Wen. 260.

Nor can the owner of the shore where the smallest quantity flows, require the other, in the use of the water for hydraulic purposes, to keep up a tight and secure dam; if such other can avail himself of the natural advantages afforded by his site, without any dam, or by an imperfect dam, he is at liberty to do so. *Id.*

A stream of water cannot be diverted from its natural course without the consent of the owner over or by whose land it passes; although such owner may not require the whole or any part of it for the use of machinery. *Id.*

Twenty years' occupation of the land of another by flowing it with water, affords a presumption of a grant of the use of it in that particular manner, and for the damages sustained thereafter no action lies; but if, after flowing the land of another for ten years, by means of a dam of a particular height, the party by a new constructed dam raises the water higher, and flows more land than he originally did, although he will be justified after twenty years in flowing the land to the extent originally covered, he will be answerable in damages for the increased quantity he flows. *Baldwin v. Callins*, 10 Wen. 167.

The remedy given to a party whose lands are overflowed, it seems, is not assignable. *Id.*

Where one has had the use of water at a given height for 20 years, a grant will be presumed of the privilege of using it at that height, but nothing more. And if he repair his dam which has kept the water at that height, so as to raise the water still higher, and flow it back upon his neighbor's mill, an action lies, though the dam itself remains at its ancient height. The question is not upon the height of the dam, but of the water. *Stiles v. Hooker*, 7 Cow. 266.

It is no defence to an action for flowing back water, so as to injure the plaintiff's mill, that his mill was built on a stream which is a public high-

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[*815] *If this view of the subject be correct, it will account for my passing over some points which were made on the argument without giving an opinion on them.

way ; and is, therefore, a public nuisance. That question lies between the people and the owner. *Id.*

The doctrine of Lord Ellenborough in 6 East, 214, referred to and approved by Judge Thompson, in *Palmer v. Mulligan*, 3 Cal. 315, is in accordance with these views. *Id.*

Where a party owns lands adjoining one side of a stream, and also owns the bed of the stream, and conveys to another owning land adjoining the stream on the other side thereof the land under water to the middle of the stream, reserving to himself the right to butt a dam on both sides or shores of the stream as he shall think necessary, the parties are entitled to an equal participation in the use of the water, notwithstanding the reservation. *Case v. Haight*, on appeal, 3 Wen. 632.

The reservation in such case has not the effect of an exception, it being indispensable to a good exception that the thing excepted should be part of the thing granted, and not of any other thing ; the reservation, however, is operative as an implied covenant, or by way of estoppel, securing the right provided for in the reservation. *Id.*

The right to overflow adjoining premises of a grantor to the extent necessary to the profitable employment of a water privilege conveyed, in the manner in which it existed and had been used previous to the grant, passes to the grantee as necessarily appurtenant to the premises conveyed. *Oakley v. Stanley*, 5 Wen. 523.

It was admitted that it caused the water to flow back beyond the defendant's line upon the premises of the plaintiff, and though the water thus produced does not impede the operation of the plaintiff's mill, yet the establishment would be much more valuable if the defendant's dam was removed, as then they would be able to increase the diameter of their wheel. *Id.*

A patent or grant of land by the state, bounded on the margin of a river above tide water, carries the land to the grantee *usque flum aqua*. *Ex parte Jennings*, 6 Cow. 518.

Otherwise, where it is bounded on a navigable river. *Id.*

A navigable river, in the common law sense of the term, is only where the tide ebbs and flows. *Id.*

A patent or grant of land was bounded on the margin of the Chitteningo creek ; held, that it carried the land to the grantee *usque flum aqua*. *Id.*

The water of the Chitteningo creek was diverted from a mill and other hydraulic works on the creek ; the right to erect the works being claimed under a patent or grant from the state, bounded on the margin of the creek ; held, that the appraisers appointed pursuant to the act, (sec. 48, c. 275, s. 1,) were bound to appraise the damages to the owners of the works, they

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This I avoid doing, because experience has already convinced me that it is always best in a judge to be silent on every point which he does not regard important and necessary in the decision of a cause.

having a right to erect them, and a right to the use of the water; that this was a case within the statute, (sect. 40, c. 262, s. 3.) *Id.*

The appraisers having refused to act, on the ground that the property of the creek was in the state; and that, therefore, they had no jurisdiction; held, that a mandamus should issue commanding them to appraise. *Id.*

The court granted a peremptory mandamus on the first motion, the case being argued on both sides; and the court understanding that the appraisers were willing to abide by the decision on the facts as they stood; but afterward, on suggestion that the appraisers wished to bring error, they changed the rule into one for an alternative mandamus; so that the facts might be put on record by a return. *Id.*

Form of the rule for a peremptory mandamus. S. C., 529.

Some account of Hale's treatise *De jure Maris et brachiorum ejusdem*, with his doctrine in relation to private waters, extracts from his treatise, and a view of the modern authorities relating to public and private right in the soil adjoining to and under water. *Id.* 536 to 554, n. a.

The owners of land adjoining a stream of water where the tide does not ebb and flow, own also the bed of the stream, *usque flum aqua*. *People v. Seymour*, 6 Cow. 579.

The treatise of Sir Mathew Hale, (*De Jure Maris*), has so often been recognized in this country and in England, that it has become the text book from which, when properly understood, there seems to be no appeal either by sovereign or subject, upon any question relating to their respective rights either in the sea, arms of the sea, or private streams of water. See *Palmer v. Mulligan*, 3 Cal. R. 307, 315, 318; *People v. Platt*, 17 J. R. 195, 209, 210; *Broker v. Cummings*, 20 J. R. 90, 99, 101; *Adams v. Pease*, 2 Con. R. N. S. 481, 483, 484; *Arnold v. Mundy*, 1 H. R. 1, 74; *Claremont v. Carlton*, 2 N. H. R. 369, 371. *Hayes' ex'rs v. Bowman*, 1 Randolph's R. 417, 420. 6 Cow. 534, n. a.

All agree that where a man's land abuts upon or adjoins to any river above the tide water, he owns the river to the centre of the stream. As long ago as 1805, in *Palmer v. Mulligan*, it appearing that the defendant owned the shore of the Hudson as low down as Stillwater, this being above tide water, Thompson, J., and Kent, C. J., applied to his case the doctrine of Lord Hale, that his ownership extended to the centre of that great river, and the latter then hinted at what is now established, that if the state will bound a grantee upon a river not navigable, he shall hold to the centre, unless there be an exception of the river in the grant. 3 Cal. R. 319. *Id.*

It seems, that though the river was navigable and subject to the public

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I will only add, that the further testimony which is expected from Schuyler, will not change what appears to me the merits of this cause.

servitude, for the passage of boats, the private rights of the owners of the adjacent soil were not otherwise affected than by the river's being subject to public use. *The People v. Platt*, 17 J. R. 195.

In that case the river Sarinac was not navigable for boats of any description, although salmon ascended into it beyond the obstruction occasioned by Platt's dam; and the court recognized the principles of the common law to be, that in the case of a private river, (that is, where it is a fresh water river, in which the tide does not ebb and flow, and is not, therefore, an arm of the sea,) he who owns the soil, has *prima facie*, the right of fishing, and if the soil on both sides be owned by an individual, he has the sole and exclusive right, but if there be different proprietors on each side, they own on their respective sides, *ad flum. medium aquæ*. *Id. Hooper v. Rummings*, 20 J. R. 91.

The same doctrine was recognized in a prior case. *Palmer v. Mulligan*, 3 Cal. R. 319.

An action will not lie for diverting the water of a river from its usual course, by erecting a dam for mills above the mills of another, if sufficient water be left to work the lower mills, though in consequence of such erection, it be necessary to run the mill dam of the lower mills further into the stream, and the difficulty of getting logs to the lower mills be increased so as to require one hand more for every twenty-five logs. Where persons have equal right to erect mill-dams on a river, the rubbish which comes from a newly erected upper dam, to an old lower dam, though it be an inconvenience to the lower of about \$250 a year, will, if a jury have found in favor of the defendant, and it appear that the floating rubbish be lessened by the erection of the upper dam, be *damnum absque injuria*. *Palmer v. Mulligan*, 3 Cal. R. 307.

The Hudson is a public river above tide water, *ut sembla*. *Id.*

The water of a raceway of a mill, will, on a sale of the mill, pass as an incident; if the water in a stream be owned by two persons whose lands are on opposite sides, and they agree to erect mills on the lands of one, and turn the whole stream to the mills, it is an appropriation of the water to the mills, and if they be held jointly or in common, a release of the right of one tenant in the mills will pass his right in the water also. *Wetmore v. White*, 2 Cal. R. 87.

The cases which hold the contrary in Pennsylvania, are founded on a repudiation of the common law. *Ex parte Jennings*, 6 Cow. 536, n. a.

Where the line ran south to the Plattekill, above tide water, thence up the same to the southwest corner of a lot this day conveyed to the said L. The court say the term "up the same," necessarily implies that if follow the creek, according to its windings and turnings, and that it must be in the

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Neither, therefore, as a verdict against evidence, nor on the ground of newly discovered evidence, can I consent to a new trial.

middle or centre of it. The rule being settled, that when a creek not navigable, and which is beyond the ebb and flow of the tide, forms a boundary, the line must be so run. *Jackson v. Law*, 12 J. R. 252.

The court (in 14 Mass 149,) say, "land granted as bounded by a river, extends to the thread of the river, unless from prior grants on the other side of a river, such a construction is negatived; and in this case the channel on the farther side of the island may well be considered as intended by the description in the grant." *Ec parte Jennings*, 6 Cow. 536, n. a.

This case was very strong for the state. The line along the river was limited nominally to two trees on the same side of the stream; one of these trees might not have touched the river at all; yet upon the principles of *Hale*, these marks are departed from, the river itself adopted as the boundary, and the line extended over, and made to include an island lying on the side of the river nearest to it. *Id.*

The case last cited from Mass. decides that a line running between two trees, one standing by the side of, and the other by the river, is a bounding or abutting on the river; that the grantee is, therefore, an adjacent owner, and his land extends, of common right, *usque filum aquæ*. *Id.*

Parsons, Ch. J., seems to take it for granted that such boundaries, if upon a stream above tide water, would have carried the ownership *usque filum aquæ*, as being a boundary on the water. He accordingly goes on to draw a distinction between the two cases. He says, by the common law of England, which our ancestors brought with them, claiming it as their birthright, the owner of land bounded on a fresh water river, owned the land to the centre of the channel of the river, as of common right; but if his land was bounded on the sea, or on an arm of the sea, where the tide ebbed and flowed, he could not, by such boundary, hold any land below the ordinary low water mark. *Id.*

And all the various expressions running through the books and cases, such as of common right, by operation of law, or by construction of law, mean the same thing; but the law carries the owner of the bank to the centre; unless otherwise expressed; and then *expressum facit cessare tacitum*. An exception may sometimes be implied, as where the river or an island in the river was previously granted. 14 Mass. 151. *Id.*

Thus, in *Hatch v. Dwight*, 17 Mass. Rep. 239, E., in 1807, mortgaged a strip of land including mills, and running a considerable distance along a river; but in 1810, having sold a small piece of the mortgaged premises, for a hide mill and lime vats, he obtained a grant, or rather release from the mortgagee, for a nominal consideration, of what he (E.) had sold; described thus: beginning at the end of a dam; running up the river two rods, and so

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TOMPKINS, J. I concur in the result of the opinions delivered.

THOMPSON, J. On the argument, the right of the plain-

round to the bank of the river. The mortgagee afterward having foreclosed, one question was whether the grant or lease gave the right to the centre of the river; and it appeared that if it was to have this effect, it would destroy the value of the mortgagee's mill privileges. For this and other reasons, it was held that it should not extend beyond the bank. The various reasons assigned by the court were, that the grant or release was limited to the bank; that there were no general words showing that a right to keep up a dam was intended to pass; that the consideration was nominal; and that it was not to be inferred that the mortgagee intended to release everything valuable in the mortgaged premises, for which she had given a large consideration. *Id.*

The court considered the release, under all the circumstances, as being no more than a mere exception in the mortgage. There were various and special circumstances in the case, which led the court to infer that the parties intended to limit the release or grant to the bank. And in conclusion they say: without doubt, by our law, the owner of land extending to the bank of a river, will own the middle of a river, if it be not navigable, and so public property. But the owner may sell the land without the privilege of the stream, as he will if he bounds his grant by the bank. They continue: the description in the lease very clearly excludes any part of the stream; and as before observed, there are no general words of more extensive signification. *Id.*

This case was between individuals, and must undoubtedly be referred to its peculiar circumstances. The court admit that an owner to the bank of a river, owns the river: but immediately say, that he may bound his grant by the bank, and the stream will not pass. This must evidently mean a bounding by reservation, or plain exclusion express or implied. Otherwise, the expression would be inconsistent in itself, and incompatible with all principle and all the cases. It is plain that the naked circumstance of bounding a grant on, to, or by a bank, cannot exclude the stream any more than bounding on the margin of the stream itself; and this the court admit; for certainly, owning "to a bank," is no more than owning on or by a bank. *Id.*

In the case of a river not navigable, every possible intendment is in favor of the grant going to the centre; whereas, in case of the sea, the intendment is directly otherwise. *Id.*

A grant of a river *eo nomine*, will not pass the soil of the river, or an island within it. *Jackson v. Halstead*, 5 Cow. 216.

If one grant *aquam suam*, the soil will not pass; but only the piscary within the water. *Id.* N. Y. Dig., vol. 4, p. 1388, *et seq.*

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tiffs to maintain an action, even admitting them to have sustained an injury, has been called in question, because, as is alleged, their mills being erected on a public river, are, in judgment of law, a nuisance. How far this allegation is founded in point of fact is not now a subject of inquiry; that is a question between the public and the plaintiffs, and cannot be tried in this collateral way. 4 Burr. 2168; Harg. Law Tracts, 8, 9. It is a fact of public notoriety, and, therefore, proper to be assumed as such, that the tide does not ebb and flow as high up the Hudson river as the place in question; and, therefore, the land under the water is, I apprehend, as much the subject of a private grant, as the land adjoining the river, subject, however, to be used by the public for the purposes of boating, and rafting, and other objects of this description, as far as shall be necessary for public use and accommodation. Harg. Law Tracts, 8, 9. These are the rules and distinctions adopted by Hargrave, and which appear to me to be just and reasonable. The right thus claimed by the plaintiffs being a subject of private and individual interest, we have only to look to the facts in the case, to see how far the plaintiffs have established this right in themselves; and without examining such fact *in de- [*316] tail, I am warranted in saying, they have all the right that may legally be presumed to result from a possession of about forty years; and which I consider amply sufficient to raise the presumption of a grant. Lord Ellenborough, in a late case decided in the court of king's bench, in England, says, the general rule of law is, that, independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water, in his own land, without diminution or alteration; but an adverse right may exist, founded on the occupation of another, and if this occupation has existed for so long a time as may raise the presumption of a grant, other parties must take the stream subject to such adverse right, and that twenty years' exclusive enjoyment of the water, in any

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particular manner, affords a presumption of right in the party so enjoying it, derived from grant or act of parliament. 6 East's Rep. 214, 215. If the rules there laid down are, as I apprehend them to be, undeniable principles of the common law, and we apply them to the present case, they will establish, beyond contradiction, the plaintiffs' right to the use of the water, in the same manner it was enjoyed before the erection of the defendants' mill and dam. No presumption of right derived from a grant can attach to the defendants, they not having been in possession more than eight or ten years. If I am correct, then, with respect to the law, as applicable to the case, it remains only to examine the facts touching the injury alleged to have been sustained by the plaintiffs, in order to test the propriety of the verdict. The broad question for the determination of the jury was, whether the plaintiffs had sustained any injury by the mills and dam erected by the defendants, about two hundred yards above those of the plaintiffs. One cause of injury complained of was the increased difficulty of getting logs into their dam. On this subject there was no contradiction of testimony. That the upper dam would increase this difficulty, was not only fully established by the plaintiffs' witnesses, but strengthened and confirmed by those of the defendants. The injury on this account is not merely nominal, but

[*817] real and permanent, and *that to a very considerable extent. One of the witnesses testified that before the defendants' dam was built, the plaintiffs might bring into their dam from one hundred to one hundred and fifty logs at a time, whereas at present they cannot more than twenty-five, and that logs are frequently lost in getting them over, or past the upper dam; that by reason thereof, within four years past, he supposed the plaintiffs had lost as much as four hundred logs, worth from thirty-five to forty pounds per hundred. Another witness who had been a sawyer in the plaintiffs mill, swore that it was impracticable to go round the upper dam with logs, and

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get into the lower dam, the course of the current being so altered, that they would run past, and that being obliged to run over the upper dam, the cribs or rafts were frequently broken, and the logs lost; that the rubbish from the upper mill was a daily inconvenience to the lower one; that he never was employed twenty-four hours in sawing, without clearing it away, which would not have been the case but for the upper dam, and he estimated the damage in the mere stoppage of the mill at eight shillings per day. From the testimony in the case, it appears that these dams are formed by throwing wings out diagonally into the river; that the upper dam stands on the channel, through which logs used to pass to the plaintiffs' mill; that the course of the current is thereby changed, set further out into the river, and rendered more rapid; that the upper dam made it necessary for the plaintiffs to extend theirs further into the river for the purpose of getting more water, and to enable them to bring logs into their dam, which would have been impracticable without such extension. From the whole current of testimony, I think it is manifest that the plaintiffs have sustained very essential injury. If the facts in the case will warrant the presumption that the plaintiffs' right is derived from a grant, that right must be understood to secure to them the use of the water, in the manner they enjoyed it before the erection of the defendants' dam. I admit that actions of this kind ought not to be countenanced, where the damages are merely nominal, or a party is put to some trifling inconvenience; but I do [*318] not consider this a case of that description: the damages here are real and permanent, and are occasioned by a diversion and alteration of the usual and ordinary current of the water. Under these circumstances I cannot think the jury confined themselves to the question of damages, but undertook to pronounce upon the law as applicable to the rights of the parties. In whatever point of light, therefore, the case is viewed, I think the verdict is

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both against law and evidence, and that a new trial ought to be granted.

I have not thought it necessary to say any thing respecting the newly discovered testimony, because I do not consider that the evidence on the trial could afford any presumption of an abandonment, or dereliction by the plaintiffs, or those under whom they claim, of the right to the use of the water as formerly enjoyed. If any doubt, however, could arise on that subject, it would, I think, be removed by the affidavit accompanying the present application.[1].

[1] A new trial will not be granted on the ground of newly discovered evidence, which is only material to impeach or contradict witnesses who were sworn at the trial. *Harrington v. Bidgelow*, 2 Denio, 109.

The granting or refusing of a new trial, on the ground of newly discovered evidence, is not a matter of discretion, where it clearly appears that the party applying for the new trial was guilty of gross negligence in not procuring on the trial such evidence, and it is exclusively cumulative. *The People v. Superior Court of New York*, 5 Wen. 114.

If a court of subordinate jurisdiction grant a new trial in a case where such objections exist, a mandamus will be awarded, directing the rule granting a new trial to be vacated. *Id.*

A new trial will not be granted, on the ground of newly discovered evidence, if it appear that the evidence might, with reasonable diligence, have been procured before the first trial. *Williams v. Baldwin*, 18 J. R. 489.

Where the defendant is apprised of a material witness whose appearance he cannot procure in time for the trial, he ought to apply to the judge to postpone the trial; and if he goes to trial without the testimony of the witness, and a verdict is found against him, the court will not grant a new trial, for the purpose of letting in the evidence of such witness. *Jackson, ex dem. Makin v. Makin*, 15 J. R. 293.

On motion for a new trial, on an affidavit of newly discovered evidence from A. B., a man of good character and reputation, the opposite party may read affidavits to question his credibility. *Pomroy v. Columbian Ins. Co.*, 2 Cal. R. 260.

A new trial will not be granted on an affidavit, stating that the newly discovered witness had told the party what he would say. *Shumway v. Fowler*, 4 J. R. 425.

In actions of ejectment for lands in the military tract, where the principal or turning point in the cause is as to the identity of the soldier or person entitled to the bounty land, each party claiming under a person of the same name, by different deeds, the court will grant a new trial on affidavits of

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KENT, Ch. J. The first object of inquiry, as arising upon this case, is, whether the fact proved by the plaintiffs will authorize a recovery?

newly discovered evidence relative to the identity of the patentee, though such evidence consists of cumulative facts to the same point which was the subject of inquiry at the former trial; these cases as to the title in the military tract being peculiar, and not strictly to be governed by the ordinary rules relative to granting new trials in other cases. *Jackson ex dem. Wobest v. Crosby*, 12 J. R. 354.

In causes concerning the title to military lands, where the identity of the soldier or original patentee is in question, a new trial may be granted, to give the defendant an opportunity of impeaching the character of the principal witness for the plaintiff; especially when the defendant has been a long time in possession. *Jackson ex dem. Rowley v. Kinney*, 14 J. R. 186.

It will not be granted on an affidavit by a witness, that he was mistaken, or surprised on his examination, and explaining and correcting a mistake in his deposition. *Steinbach v. Columbian Ins. Co.*, 2 Cal. R. 129.

A new trial will be granted in a feigned issue out of chancery, on an affidavit of newly discovered evidence. *Doe v. Roe*, 1 J. C. 403.

On motion for a new trial in ejectment, the affidavits stated, that C. who claimed title to the land in the possession of B, his tenant, had the care and management of the defence of the suit, and was present at the trial; that F. was a witness at the trial, but that C. did not know, until after the trial, that F. knew, or could testify the facts, stated as material; though it appeared that B, the tenant, who was not present at the trial, did know before the trial, what F. could testify. A new trial was granted, on payment of costs, as the evidence was material, and the suit being to change a possession of several years. *Jackson ex dem. Gardner v. Laird*, 8 J. R. 489.

The party applying for a new trial should lay before the court the facts in the knowledge of his witnesses, or give an excuse for the omission. *Hollingsworth v. Napier*, 3 Cal. R. 182.

The court will decide on the materiality of the evidence, and grant the motion, or not, accordingly. *Halsey v. Watson*, 1 Cal. R. 24; *Enderick v. DeLafield*, 1 Cal. R. 67.

In order to obtain a new trial, on the ground of newly discovered evidence, it ought to appear that the testimony has been discovered since the last trial, or that no laches is imputable to the party, and that the testimony is material; if the party had known of the existence of the testimony, and could not procure it in time, he ought to have applied to postpone the former trial. *Vandervoort v. Smith*, 1 Cal. R. 186; *Hollingsworth v. Napier*, 3 Cal. R. 182; *Palmer v. Mulligan*, *id.* 301. See 15 J. R. 293, 18 J. R. 489.

There are certain principles which must be considered settled. 1. The testimony must have been discovered since the former trial. 2. It must appear that the new testimony could not have been obtained with reasonable

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The plaintiffs, and those from whom they derive title, own the land on the Hudson river at Stillwater, and had, for upwards of thirty years before the erection of the dam

diligence in the former trial. 3. It must be material to the issue. 4. It must go to the merits of the case, and not to impeach the character of a former witness. 5. It must not be cumulative. *The People v. The Superior Court of New York*, 10 Wen. 292.

A want of recollection of a fact which by due attention might have been remembered, cannot be a reasonable ground for granting a new trial; for want of recollection may always be pretended, and may be hard to be disproved. *Bond v. Cutler*, 7 Mass. R. 207. *Id.*

Where a motion for a new trial is founded both upon irregularity and newly discovered evidence, it is an enumerated motion. *Anonymous*, 2 Cow. 586. *Ransom v. Isaacs*, 1 Cal. R. 22; *Foden v. Sharp*, 4 J. R. 183.

And the counsel having moved the matter as a non-enumerated motion, the papers were returned without farther consideration. *Anon.* 2 Cow. 586.

A new trial will not be granted, even in a criminal case, because the district attorney, by mistake, withholds in his hands papers important to the defendant, unless the latter uses due diligence to obtain them. Where the district attorney told him, by mistake, they were in the hands of C, who, on being applied to, answered they were with the district attorney; but the defendant did not explain the mistake, and apply to the district attorney again; held, a want of due diligence. *The People v. Vermilyen*, 7 Cow. 369.

A new trial will not be granted, on motion of a defendant convicted in a criminal case, on the ground that a co-defendant tried at the same time, and acquitted, was a material witness for the convicted defendant. *Id.*

Such testimony is not newly discovered, though the acquitted defendant is now, for the first time, competent as a witness. *Id.*

A new trial will not be granted, on the ground of newly discovered evidence, when that evidence is merely cumulative. *Whitbeck v. Whitbeck*, 9 Cow. 366.

The law will not allow a new trial to the defendant, merely to afford him an opportunity to prove the plaintiff a felon. Such an indulgence would not have been granted to the people, if the party so charged had been once tried and acquitted. *Bears v. Root*, 9 J. R. 264.

If the defendant had discovered new evidence which went to the plea of not guilty and that only, it would have altered the case. *Id.*

Neither will new trial be granted to impeach witnesses who testified on the former trial. *Halsey v. Watson*, 1 Cal. R. 24; *Shumway v. Fowler*, 4 J. R. 425; *Durges v. Dennison*, 5 J. R. 248; *Brown v. Hoyt*, 3 J. R. 255; *Jackson ex dem. Rowley v. Kinney*, 14 J. R. 186. See *The People v. The Superior Court of N. Y.*, 10 Wen. 285.

A party moving for a new trial upon the ground of newly discovered evi-

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complained of, owned and enjoyed a grist and saw mill upon that river. The Hudson at Stillwater is a fresh river, not navigable in the common law sense of the term, for the

dence, is bound to produce the affidavits of the witness, from whom such evidence was to come, setting forth the facts, or show that such affidavit could not be obtained. *Denn v. Morrel*, 1 Hall, 382.

Where the evidence is strictly cumulative, it cannot be the ground of granting a new trial. *Whackwright v. Beers*, 2 Hall, 391.

It cannot be objected to the granting of a new trial on the ground of newly discovered evidence that such evidence is cumulative, if the evidence alleged to be newly discovered is of a different kind and character from that adduced on the trial; as where the evidence on the trial is wholly circumstantial and the evidence newly discovered is positive and direct. *Guitot v. Butts*, 4 Wen. 579.

In ordinary cases, where the newly discovered testimony consists of admissions made by the party against whom it is intended to be used, the motion will not be granted; but where the suit is against executors of a deceased person on a stale demand, the motion will be granted; and in such case, the court will not be astute in inquiring into the discrepancies between the testimony given and that offered to be produced on the second trial, but will leave the credibility of the witnesses to be passed upon by the jury. *Id.*

Application for a new trial on account of newly discovered evidence considered. *Porter v. Tulcoot*, 1 Cow. 359.

New trial granted in ejectment for land in the military tract, on the ground of newly discovered evidence; though this was cumulative merely, and tended to impeach a witness sworn at the first trial. Ejectment for military lots are, in this respect, an exception to the general rule. *Jackson v. Hooker*, 5 Cow. 207.

It is against the general rule to grant a new trial, merely for the discovery of cumulative facts and circumstances relating to the same matter, which was principally controverted upon the former trial. It is the duties of the parties to come prepared upon the principal point, and new trials would be endless, if every additional circumstance, bearing on the fact in litigation, was a cause for a new trial. *Smith v. Brush*, 8 J. R. 84; *Steinback v. Col. Ins. Co.*, 2 Cal. R. 129; *Pike v. Evans*, 15 J. 210.

The judge at the trial has a discretion in respect to the admission of evidence out of the regular and usual course. Thus, after the defendant's counsel had summed up, and while the counsel for the plaintiff were speaking, the counsel for the defendant informed the judge, that he had just discovered, from a paper in the possession of one of the plaintiff's witnesses, that the money, &c., was not in fact received, &c.; and asked leave to give that in evidence, and upon the judge's refusal the court granted a new trial, with costs to abide the event of the suit. *Mercer v. Sayre*, 7 J. R. 306.

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tide does not ebb and flow at that place. In the case of *The Royal Fishery, in the river Banne*, Davies' Rep. 152, 155, 157, it was resolved, that by the rules and authorities of the common law, every river where the sea does not ebb and flow, was an inland river not navigable, and belonged to the owners of the adjoining soil. This case was cited by Mr. Justice Yates, in *Carter v. Murcott*, 4 Barr. 2162, as a very good case, and a solid authority, and in that latter

On a motion for a new trial, on the ground of newly discovered evidence, a case of what transpired on the trial must be presented. *Acen.*, 7 Wen. 331.

A party who asks for a new trial on the ground of newly discovered evidence is chargeable with laches, if previous to the trial he knew that the witness, whose testimony he seeks to introduce as newly discovered, must probably from his situation and employment at the time of the transaction, the subject of the controversy, be conversant with the facts in relation to the transaction, and especially where previous to the trial the party knew, as the witness himself testifies, what the witness could testify to, although at the time of the trial, and while preparing therefor, the party had forgotten what the witness could testify to. *The People ex rel Oelrichs v. The Superior Court of N. Y.*, 10 Wen. 285.

Evidence is cumulative when it goes to the fact principally controverted on the former trial, and respecting which the party asking for a new trial produced testimony on the trial of the cause, as in this case, where the turning point of the cause was, whether a bill of exchange was or was not left at a bank for collection before noon of a certain day, and both parties produced testimony as to the time when the bill was left, it was held, that the evidence of a witness not produced on the trial, corroborating and supporting testimony which was adduced that the bill was left after noon, was cumulative. *Id.*

Where the question upon the trial was, whether a suit of clothes had been left at the stage office in Utica, in season to be sent to Sackett's Harbor by the stage. The verdict was against the defendant. The newly discovered testimony, the court say, is material to make out the delivery of the clothes by the time agreed on, and the only objection was that the testimony was cumulative. They add that the newly discovered evidence did not relate to any new fact. *Pike v. Evans*, 18 J. R. 210.

The evidence there was material; but it went to prove what had been the point in dispute on the former trial. It was rejected as cumulative. *Id.*

Cumulative evidence is said to be such as tends to support the same fact which was before attempted to be proved. *The People v. The Superior Court of N. Y.*, 10 Wen. 285. 3 New York Dig., p. 590, *et seq.*

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case recognized this distinction between rivers navigable and not navigable; and in *The King v. Wharton*, 12 Mod. 510, Lord Holt laid down the *same doctrine. [*319] In Sir Mathew Hale's excellent treatise, *de jure maris, &c.*, Hargrave's Law Tracts, and which is considered by Mr. Butler as exhausting the whole law on the subject, he lays down the law generally that fresh rivers, of what kind soever, do, of common right, belong to the owners of the adjacent soil, but he admits that fresh rivers, as well as those which ebb and flow, may be under the servitude of the public interest, and may be of common or public use for the carriage of boats, &c., and in that sense may be regarded as common highways by water. Thus, he adds, that the Wey, Severn, Thames, &c., as well above as below the flowing of the tide, and as well in the parts where they are of private as of public property, are public rivers *juris publici*; and nuisances and impediments therein are liable to be punished by indictment. They are called public rivers, not in reference to the property of the river, but to the public use. Hargrave, p. 5, 8, 9. This is the true and just rule which harmonizes private right with the public interest. The Hudson at Stillwater is capable of being held and enjoyed as private property, but it is, notwithstanding, to be deemed a public highway for public uses, such as that of rafting lumber, to which purpose it has heretofore been, and still is, beneficially subservient. To obstruct this and other public uses of the river, by dams, &c., would be a nuisance, but of this question we have nothing to do in the present case. Whether a dam or mill be a nuisance, is a question of fact which is not examinable in this present action, and if it was, there is every reason to conclude that neither of the dams or mills are nuisances from the length of time that they have been permitted to remain.

It is not stated whether the river was, or was not, excepted out of the grants under which the parties in this suit hold their property. The case admits that the right

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of the premises, whatever it is, was in the plaintiffs, and we have seen that the river at the place in question is susceptible of being granted without any public inconvenience, because the right of the public to the use of the [*820] water for *navigation would remain incontestable.

As between the parties to this suit and the question litigated by them, the water may be considered as if included in their grants, whatever the real fact may be. The defendants have clearly, therefore, no right to obstruct the plaintiffs in the enjoyment of the water. They have an equal right to build a mill on their soil, but they must so use the water, and so construct their dam, as not to annoy their neighbor below in the enjoyment of the same water. The plaintiffs had used and enjoyed their mills even beyond the present period of limitation in a writ of right, when the defendants built their dam. It was not requisite, however, that the plaintiffs should have been able to prescribe for the enjoyment of their mills. It is sufficient that they had an interest in the water, and the defendants cannot lawfully divert the natural course of the river or injure the plaintiffs in the exercise of their rights. A watercourse doth not begin by prescription, as Whitlock, J., observes, nor yet by assent, but the same both begin *ex jure natura*, having taken this course naturally, and cannot be diverted. All the cases agree that the plaintiff need not aver his mill to be an ancient mill, where a natural watercourse is diverted. 1 Vent. 237. Skinn. 65. Palm. 290. 1 Wils. 174. 3 Bulst. 340. The fact, then, of the interruption of the use of water, after the mill was burnt, and before it was rebuilt, is perfectly immaterial. The question is, have not the defendants materially and permanently injured the plaintiffs by giving a different direction to the course of the main current? Many cases may be supposed which would be *damna absque injuria*; such, for instance, as the insensible evaporation and decrease of water by dams, or the occasional increase and decrease of the velocity of the current, and of the *quantum* of water be-

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low. Many such circumstances may be inevitable from the establishment of one dam above another upon the same stream. The question in such cases would turn upon the nature and extent of the injury. Here the injury is a continued and permanent one, and very material to the party. The defendants have not attempted *to show [*321] that the injury was inevitable, and that they cannot have and enjoy a mill in the place they do, without creating this injury. What would be the effect of this proof, if shown, would be another question; but no such defence has been attempted, and I may take it, therefore, for granted, that the defendants can, if they please, so alter their dam as to be able to enjoy their mill and avoid giving the injury.

If a right of action in the plaintiffs be assumed, I think this a case proper for the interference of the court. The verdict is clearly against evidence. The plaintiffs had eight witnesses who established the fact that the dam and mills of the defendants did materially injure and disturb the plaintiffs. One witness estimated the damage from 90 to 100 dollars a year. The four witnesses on the part of the defendants do not attempt any direct contradiction of this fact. They prove only that the plaintiffs had felt inconveniences before the erection of the defendants' dam, but they do not deny but that these inconveniences have been increased.

For these reasons I am of opinion that the verdict ought to be set aside.

New trial refused.

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M'VICKAR *against* WOOLCOT.

On the death of a witness to be examined on a commission, the court will not permit a new name to be inserted, though they may allow a new commission, at the peril of the party.

HOPKINS, in consequence of the death of a witness to be examined on a commission sent to England, and sued out early in the last spring, moved, on behalf of the defendant, to amend by inserting the name of a new witness, who could prove the fact the testimony of the deceased would have gone to establish, or to be at liberty to issue a new commission.

Per Curiam. Were we, to permit the amendment, the opposite party might lose the benefit of cross-examining; for the interrogatories exhibited to one might not be proper to administer to another, from whom it might be [*322] *wished to extract new evidence. The first part of the motion must, therefore, be denied; but you may take a new commission at your peril, without, however, any stay of proceedings on the part of the plaintiff.

COOK and others *against* CAMPBELL and LORAINÉ.

To warrant proceedings against bail, there need not be eight days between the *teste* and return of the *ca. sa.* against the principal; it is enough if it have lain four days in the sheriff's office.

In debt on recognisance of bail, the defendants pleaded, 1. *Nul tiel record*; 2. That the *ca. sa.* against the principal was not duly issued. The plaintiffs replied, taking issue on both pleas.

Under these circumstances the plaintiffs gave notice of

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bringing on the trial by record, and the defendants of setting aside the whole proceedings for irregularity in the *ca. sa.*

Both motions came on together, and the record being admitted, judgment was demanded, against which the defendant relied on the irregularity, to prevent its being allowed.

Boyd, for the defendants, insisted that to warrant any proceedings against bail, there must be eight days between the *teste* and return of the *capias ad satisfaciendum*. 1 Sell. Prac. 550; 2 Salk. 601; *Ball v. Manucaptors of Russell*, 2 Ld. Raym. 1176. S. C. This objection appearing on the face of the record, was, he urged, a sufficient reason for refusing the application for judgment: and though the matter ought not to have been availed of by plea, still that informality would not prejudice. In favor of bail the court go great lengths, and 1 Black. 74 would be found a stronger case than the present.

Van Wyck, contra. There cannot be any cause assigned for the practice mentioned. The writ has lain four days in the sheriff's office, and is all which is requisite.

Per Curiam. The plaintiffs must have their judgment, and the motion on behalf of the defendants be denied. There is no such practice of this court, as that of requiring eight days between the *teste* and return of the *ca. sa.* nor is there any reason why it should be necessary.(a)

Judgment for the plaintiff.

(a) See *Carter v. Weeks & Tompkins*, 3 Johns. Rep. 346, the same point in almost *totidem verbis*, in which the Chief Justice supposed it had not been antecedently determined.

Van Winkle v. Ketcham.

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*VAN WINKLE *against* KETCHAM.

The note of an infant given in the course of trade cannot be enforced against him by the payee.

THE COURT decided in this cause, that the promissory note of an infant, carrying on trade as adult, could not be enforced against him by the payee, who had taken it in the course of business, without knowing the defendant's nonage.^(a)

LENOX, MAITLAND and RENWICK *against* HOWLAND,
RUSSEL and others.

For all demands arising *ex contractu*, though the amount be unliquidated, an attachment may be issued against the property of absconding and absent debtors, under the act granting relief against them.

THE COURT having, on a former day, (see *ante*, 257,) allowed the plaintiffs to show that they had such a demand against the defendants as would warrant the attachment,

Hoffman now read an affidavit by which it appeared that

[1] The note of an infant, (though a negotiable one,) is voidable and not void, and may be affirmed after the infant comes of age. *Goodell v. Myers*, 3 Wend. 479; *Roof v. Stafford*, 7 Cow. 179; see 10 Johns. Rep. 33.

Where an infant took the note of a third person in payment for work done, and retained it for eight months after he came of age, and then offered to return it and demanded payment for his work; held, in an action for the work and labor performed by him, that the retaining of the note for such a length of time was a ratification of the contract made during infancy, especially when, in the mean time, the maker of the note had become insolvent, the debt lost, and the offer to return made on the heel of that event. *Delano v. Blake*, 11 Wen. 85. 3 New York Dig., p. 42.

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their claim was founded on the contract contained in a bill of lading, for the delivery of goods shipped on board the defendant's vessel.

LIVINGSTON, J., delivered the opinion of the court. We are to determine, not whether the affidavit now read would have been the proper basis of an attachment, but whether the demand, as now disclosed, is sufficient to support it. Although by the terms of the oath the creditor is to swear that the party is indebted to him in the sum of one hundred dollars or upwards, it does not follow that the demand is to be certain as to fall within the technical definition of a debt, or as to be susceptible of liquidation, without the intervention of a jury. The law is remedial, and should be so construed as to embrace as many cases as possible. Being indebted is synonymous with owing; it is sufficient, therefore, if the demand arise on contract. The other provisions of the act plainly indicate, that its relief was to extend thus far at least, and, if the whole act be construed together, leave but little or no doubt on the subject. The 18th section declares, that in case a controversy arise concerning any claim, debt, or demand, respecting the estate of *the debtor, the trustees may have it [*324] settled by reference; and by the 21st section, the attachment may be superseded, if the debtor will give security to appear and plead to any action to be brought against him in any court of law or equity, and to pay such sum as shall be recovered against him. It is very evident from these sections that it was not intended to confine the remedies, either in favor of, or against, such estate, to cases of ascertained and liquidated debts. Else why speak of any claim in the first, and why compel, by the other, the party, in order to get rid of this process, to appear to any suit in law or equity. These terms are broad enough to include at least all demands originating in contract. Nor can it make any difference whether the goods in the present case were not delivered at all, or delivered in a da-

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amaged condition. In either case the demand arises on the bill of lading. Nor ought the form of declaring to vary the case. In the first case, the party might certainly declare, generally, that the goods did not come to hand, without stating that this was owing to the negligence or carelessness of the master, and if this general form of declaring cannot be pursued in the latter case, it can and ought to make no difference. In both cases the owners are liable on the contract of the master, as much as if they had signed it themselves. Nor can the difficulty of ascertaining the precise damage make any difference. This must always be more or less liable to some uncertainty. To obtain a liquidation a reference may be resorted to, and if the trustees will not submit to one, they may be sued, and a jury will settle the *quantum* of the demand. If a carpenter contracts to build a house for a given sum, and does it so negligently that it falls the very day it is finished, and then absconds possessing a large property, it would be strange that I should have no remedy, because it be necessary to declare against him for a misfeasance or nonfeasance, or because it may require some little calculation to settle the damages. The substantial inquiry, in this stage of the proceeding, must be to ascertain whether the party has a [*325] *legal claim arising on contract, not by what kind of action it is to be enforced, which has ever appeared to me a very fallacious mode of testing questions of this kind. From the whole tenor of the act it is very evident, whatever may be the phraseology of its first clause, that its design was to place the property of a debtor in trustees for the payment, not solely of debts within the legal acceptation of that term, but of every demand contracted against his estate, as well those due to the attaching party, as to others, and in like manner to give the trustees a remedy as broad against third persons. If we once begin to refine or make nice distinctions on this subject, no one can say where we shall land. The act will soon be repealed or become a dead letter. As this demand, then,

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is founded on contract, it can be of no importance in what way the injury arose, nor can we say it is of a kind not to support the attachment. The *supersedeas* is, therefore, denied.(1)

[1] The New York Code of 1852 contains the following provisions relative to attachments:—

In an action for the recovery of money, against a corporation created, by or under the laws of any other state, government, or country, or against a defendant who is not a resident of this state, or against a defendant who has absconded or concealed himself as hereinafter mentioned, the plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of such defendant attached, in the manner hereinafter prescribed, as a security for the satisfaction of such judgment as the plaintiff may recover.

A warrant of attachment must be obtained from a judge of the court in which the action is brought, or from a county judge.

The warrant may be issued whenever it shall appear by affidavit, that a cause of action exists against such defendant, specifying the amount of the claim, and the grounds thereof, and that the defendant is either a foreign corporation, or not a resident of this state, or has departed therefrom with intent to defraud his creditors or to avoid the service of a summons, or keeps himself concealed therein with the like intent.

Before issuing the warrant, the judge shall require a written undertaking on the part of the plaintiff, with a sufficient surety, to the effect, that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain, by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred and fifty dollars.

The warrant shall be directed to the sheriff of any county in which property of such defendant may be, and shall require him to attach and safely keep all the property of such defendant within his county, or so much thereof as may be sufficient to satisfy the plaintiff's demand together with costs and expenses. The amount of which must be stated in conformity with the complaint, together with costs and expenses. Several warrants may be issued at the same time to the sheriffs of different counties.

The sheriff to whom such warrant of attachment is directed and delivered, shall proceed thereon in all respects, in the manner required of him by law in case of attachments against absent debtors, shall make and return an inventory, and shall keep the property seized by him, or the proceeds of such as shall have been sold, to answer any judgment which may be obtained in such action, and shall, subject to the direction of the court or judge, collect and receive into his possession all debts, credits and effects of the defendant. The sheriff may also take such legal proceedings, either in his own name or in the name of such defendant, as may be necessary for that purpose, and

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discontinue the same at such times and on such terms as the court or judge may direct.

If any property so seized shall be perishable, or if any part of it be claimed by any other person than such defendant, or if any part of it consist of a vessel, or of any share or interest therein, the same proceedings shall be had in all respects as are provided by law upon attachments against absent debtors.

The rights or shares which such defendant may have in the stock of any association, or corporation, together with the interest, and profits thereon, and all other property in this state of such defendant, shall be liable to be attached and levied upon and sold to satisfy the judgment and execution.

The execution of the attachment upon any such rights, shares, or any debts or other property incapable of manual delivery to the sheriff, shall be made by leaving a certified copy of the warrant of attachment with the president or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or with the debtor or individual holding such property, with a notice showing the property levied on.

Whenever the sheriff shall with a warrant of attachment, or execution against the defendant, apply to such officer, debtor or individual, for the purpose of attaching, or levying upon, such property, such officer, debtor, or individual, shall furnish him with a certificate under his hand, designating the number of rights or shares of the defendant in the stock of such association or corporation, with any dividend, or any incumbrance thereon, or the amount and description of the property, held by such association, corporation or individual, for the benefit of, or debt owing to the defendant. If such officer, debtor or individual refuse to do so, he may be required by the court or judge to attend before him, and be examined on oath, concerning the same, and obedience to such orders may be enforced by attachment.

In case judgment be entered for the plaintiff, in such action, the sheriff shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose ;

1. By paying over to such plaintiff the proceeds of all sales of perishable property, and of any vessel, or share or interest in any vessel sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy such judgment ;

2. If any balance remain due, and an execution shall have been issued on such judgment, he shall proceed to sell under such execution so much of the attached property, real or personal, except as provided in subdivision four of this section, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands ; and in case of the sale of any rights or shares in the stock of a corporation or association, the sheriff shall execute to the purchaser a certificate of sale thereof, and the purchaser shall thereupon have all the rights and privileges in respect thereto which were had by such defendant.

3. If any of the attached property belonging to the defendant, shall have passed out of the hands of the sheriff without having been sold or converted

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into money, such sheriff shall re-possess himself of the same, and for that purpose shall have all the authority which he had to seize the same under the attachment, and any person who shall wilfully conceal or withhold such property from the sheriff, shall be liable to double damages at the suit of the party injured.

4. Until the judgment against the defendant shall be paid, the sheriff may proceed to collect the notes, and other evidences of debt and the debts that may have been seized or attached under the warrant of attachment, and to prosecute any bond he may have taken in the course of such proceedings, and apply the proceeds thereof to the payment of the judgment.

When the judgment and all costs of the proceedings shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property or the proceeds thereof.

The actions herein authorized to be brought by the sheriff, may be prosecuted by the plaintiff, or under his direction, upon the delivery by him to the sheriff of any undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff from all damages, costs and expenses on account thereof, not exceeding two hundred and fifty dollars in any one action. Such sureties shall in all cases, when required by the sheriff, justify, by making affidavit that each is a householder, and worth double the amount of the penalty of the bond, over and above all demands and liabilities.

If the foreign corporation or absent or absconding or concealed defendant, recover judgment against the plaintiff, in such action, any bond taken by the sheriff, except such as are mentioned in the last section, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant or his agent on request, and the warrant shall be discharged, and the property released therefrom.

Whenever the defendant shall have appeared in such action, he may apply to the officer who issued the attachment, or to the court, for an order to discharge the same, and if the same be granted, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered or paid by him to the defendant or his agent and released from the attachment.

Upon such application, the defendant shall deliver to the court or officer an undertaking executed by at least two sureties, resident and freeholders in this state, approved by such court or officer, to the effect that the sureties will on demand pay to the plaintiff, the amount of the judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking, which shall be at least double the amount claimed by the plaintiff in his complaint.

When the warrant shall be fully executed or discharged, the sheriff shall return the same, with his proceedings thereon, to the court in which the action was brought.

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The sheriff shall be entitled to the same fees and compensation for services and the same disbursements under this title, as are allowed by law for like services and disbursements under the provisions of chapter five, title one, and part two of the Revised Statutes.

 LINK *against* BEUNER.

A sale of the services of a slave, is the same as a sale of a slave.[1] A slave imported into the state after June, 1785, and sold after October, 1801, is within the protection of the act of 1788, and entitled to be free, notwithstanding the law of 1788 is repealed by that of April, 1801 he having acquired, under the statute of 1788, a right not to be sold, which right is preserved to him by the proviso in the repealing act of 1801.

THIS was an action to recover the amount paid for the services of a negro man named Bartley, and brought up on the following case.

By an act of the legislature, passed in 1788, proprietors introducing slaves into this state, after the 1st day of June, 1785, were prohibited from selling them as slaves, and such persons, if "sold contrary to the true intent and meaning of the act," were declared to be free.

In 1794, Jasper Parsons, the former owner of the negro in question, brought him into this state: On the 8th of April, 1801, by the 5th section of another law respecting slaves, it was enacted, "That if any person whatsoever, within this state, shall, under any color or pretext whatever, sell as a slave, or transfer for any period whatever, any person who shall hereafter be imported or brought into this state as a slave," "every person so imported or brought into this state, and sold contrary to the true intent and meaning of this act, shall be free."

On the same day it was ordained by another stat-

[1] An agreement by the owner of a negro slave, that the slave shall work for another during his life; provided that if the vendee sell him within two years, he shall pay the vendor one-half the purchase money, is a sale of the slave. *Trongott v. Byers*, 5 Cow. 480.

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ute, (1 Rev. Laws, 619, c. 189,) that "all acts and parts of acts, heretofore passed by the legislature of this state, which come within the purview or operation of any of the acts passed during the present session of the legislature, commonly called the revised acts, shall be, and the same are hereby repealed from and after the first day of October next; provided, however, that such repeal shall not affect any act done, right accrued, &c., previous to the said first day of October next, but every such act and right shall remain as valid, &c., as if all the acts and parts of acts hereby intended to be repealed, had remained in full force."

In March, 1803, when the negro above named was 13 years old, Parsons, for a *bona fide* consideration, transferred to the defendant his services for 20 years, by a regular indenture, containing a clause of manumission at the expiration of that time. In April, 1804, the defendant, for the sum of 225 dollars, by indorsement assigned the residus of the term to the plaintiff, into whose service the negro entered, but on the 15th of August following deserted it, claiming to be free.

It was now submitted to the court whether, under the above circumstances, he was entitled to freedom? if so, the right to recover was admitted.

Harrison, for the plaintiff. This is a case, arising on the law, as it stood antecedent to the last statute on this subject. It must be considered on the footing of the act of 1783; for that of 1801 did not introduce new regulations, so much as confirm the old; of which it makes a part. By the first of these statutes, slaves introduced into this state, after the first of June, 1735, and sold as such, are declared to be free.

But here it may be said, the negro in question was not sold as a slave. Allowing him not to have been disposed of *intodidem verbis* as a slave, the transfer is, in effect, the same, for it is to last for 20 years of the life of a man of 18. This would exhaust all the valuable portion of his

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existence, and if not within the strict letter of the [*327] law of 1788, is clearly within the proviso of the 5th section of that of 1801. It is there declared, any person, "under any color or pretext," sold as a slave, "or transferred for any period whatever," "contrary to the true intent and meaning" of the act, shall be free. The true intent and meaning of the legislative provisions, on this subject, were, from the first, to prevent the importation and traffic in slaves. Courts have, therefore, been liberal in the exposition of these ordinances, and extended their principles to transactions not within the words, but the mischief. A case arose, where a man, who had deserted from his master's service in another state, was sold here for a period which would wear out the prime of his days, and yet, though he was not imported, nor sold as a slave, the court held the manner of a slave's entering into this state to be an immaterial circumstance, not inquirable into; and that the transfer was a mere evasion of the act, which would become a dead letter, if sales of services were to be tolerated. It follows that the insertion of that word, in the conveyance from Parsons, does not make this transaction less a sale, nor in the least impeach the negro's title to freedom.

Radcliff, contra. The act of 1788, having been repealed in 1801, cannot affect a sale in 1803. But allowing that this case might be covered by the act of 1788, still we contend it is not within the provisions of that law, because they are applicable only to sales for life. In *Saber v. Hitchcock*, decided in this court in October, 1800, and from hence carried into the court of errors, it was adjudged that the sale by the executor in that case, of the services of a slave to continue in service so long as the parties should agree, was not within the statute. In the same term the determination alluded to by the learned counsel on the opposite side, took place. It was in the case of *Fish v. Fitcher*; but that was essentially different from the one now before the

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court. There a runaway slave from New Jersey, of 25 years of age, was sold for 20 years, with a power of exercising during that period all the authorities of a master in correcting, imprisoning, &c., and at the expiration of the time to revert to his *former owner. This [*328] was ruled to be an evasion of the act; but the decision was only by a majority of the court, Lewis and Benson, justices, dissenting.

KENT, Ch. J. The principle of the judgment was, that a mere alteration in the words of sale did not vary the construction we ought to give to the statute.

Radcliff. Whatever may have been the principle of the decision, as it arose under the act of 1788, it cannot govern the present case, which must be determined according to the provisions of the law of 1801, repealing, without reservation, the statute of 1788. It was a substitute for the former regulations, which were then totally done away, and had only a prospective view to future cases; to slaves "thereafter" imported. A sale, therefore, in 1803, of a slave brought into this state in 1794, cannot be within the operation of the law of 1801. And as the act of 1788 was in 1801 totally repealed, a transaction in 1803 must be equally without the statute of 1788. The repealing act of 1801 abrogates all acts within the purview of the revised laws; the law of 1788 was within the purview of that of 1801, and being so repealed, cannot form one system with the revised laws.

KENT, Ch. J. Are not all rights acquired saved by the repealing act of 1801? and had not the negro, under the act of 1788, acquired some right?

Radcliff. No. A right not to be sold is not a legal right within the act. To acquire a right some act must be done, and the very transfer gave him a right he had not before, for it contains a manumission.

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LIVINGSTON, J. Was the declaration that he should be manumitted a manumission? and supposing the negro not to be free, would he not, if no farther act had been done, have continued the servant of his former owner, and entitled, under our present law, to demand support of Parsons?

Radcliff. I conceive not; for the words are like those in a lease where words *in presenti* are used. There is nothing to prevent the operation of such a manumission.

Harrison, in reply. The case of *Saber v. Hitchcock* [*329] proceeded *on the ground of its being a sale by an executor; therefore, to be considered as a sale by due course of law, and not as the voluntary act of the party, which alone the statute was meant to prohibit. All slaves imported under the act of 1788 had a clear legal right of not being sold to any new master, and to be free if they were so sold. This right is preserved by the clause in the repealing statute of 1801. That law did not change the situation of slaves; it preserved all their rights entire. As to the manumission, it ought to have been by way of covenant. There is no making free *in futuro*.

Per Curiam. The sale in this case is within the principle of *Fish v. Fitcher*, and an evasion of the act of 1788. Under that law, the negro acquired a right not to be sold; an important right which secured him against a change of master; he also acquired a further right of being free if that right was invaded. These rights, the proviso of the repealing act of 1801 continued to him unimpaired, for it is not possible to suppose that the legislature intended to leave all slaves imported between June, 1785, and October, 1801, out of the protection of every law.[1]

Judgment for the plaintiff.

[1] Question on the writ *de homine replegiando* in the case of a slave escaped from the service of his master; and as to the proof necessary to be exhibited. *Dixon v. Allender*, 18 Wen. 678.

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The legislature had the power to require persons entitled to the services of children born of slaves to cause a record to be made of the ages of such children, and in default thereof, to reduce the term of servitude. *Griffin v. Potter*, 14 Wen. 209.

A strict compliance with the terms of the act in this particular, must be shown, or the term of servitude will be reduced. *Id.*

Where the services of a negro (whose services it was supposed might be disposed of) were sold for a term of five years, and he left the employment of his master, asserting his freedom, and it appeared that he was in fact free at the time of the sale: it was held, in an action by the vendor against the vendee, to recover the sum agreed to be paid for his services, that the consideration of the promise to pay was illegal, and in analogy to the rule of law applicable to the sale of chattels, and that the assertion of freedom in this case, was equivalent to the legal eviction of a vendee, on the claim of the true owner. *Livingston v. Bain*, 10 Wen. 384.

If the owner of a slave, who executed a deed of manumission, does not deliver it to the slave, or to some person for his benefit, the manumission is not complete, and the slave is not free. *Petry v. Christy*, 19 J. R. 53.

Where the owner of a slave promised to manumit the slave, his wife and child, on his procuring good notes for \$200, and giving his own note for \$75; and the slave accordingly procured and gave the notes to G., who approved of them and executed a deed of manumission, and procured the usual certificate from the overseers of the poor, but refused to deliver the deed, and kept it with the other papers in his hands for more than two years, during which time he detained the man, his wife and child, as slaves; in an action against G., the maker of one of the notes, which was payable in five months; held, that the freedom of the slaves being the consideration on which the note was given, there was a failure of consideration, and that G. was not entitled to recover. *Id.*

Where a slave escaped from one state into another, and is pursued by his owner, and taken before a magistrate, and the magistrate, in pursuance of the law of congress, examines into the matter, and grants a certificate that the slave owes service or labor to the person claiming him, and allows the claimant to remove him to the state from which he fled, the claimant cannot be prevented from removing him by a writ *de homine replegiando*, sued out under the authority of a state law. *Jack v. Martin*, 12 Wen. 311; S. C., 14 Wen. 547.

The right of legislation on this subject belongs exclusively to the national government; and if such right be conceded to have been originally concurrent, after the exercise of its power by the national government, all control over the subject of the state governments necessarily ceases, so as to avoid the effect of adverse and conflicting legislation. In cases of collision, state laws yield to the superior authority of the laws of the general government. *Id.*

To entitle the owner of a sale to the benefit of the provisions of the con-

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stitution and laws of the United States in this respect, it is not necessary that he should be a citizen of the state from which the slave fled; it is only incumbent upon him to show, that under the laws of the state from which the slave escaped, he is entitled to the service or labor of the slave. *Id.*

It seems that the owner or his agent may, in the first instance, without process, arrest a fugitive slave. *Id.*

Where a fugitive slave, on being brought before an officer on a *habeas corpus*, sues out a writ *hominis replegiando*, and judgment upon that writ is given for the claimant, it is the duty of the officer allowing the *habeas corpus* to grant a certificate authorizing the removal of the fugitive. *Ex parte Floyd v. The Recorder of New York*, 11 Wen. 180.

D. owned a slave which he agreed to manumit on six and a half years' faithful service. He then sold the slave to B. who manumitted him before that time had expired, without obtaining a certificate of the slave's ability to maintain himself, pursuant to the statute, (secs. 40, c. 137, a. 7;) and he being in fact unable to maintain himself, at the time of the manumission. The slave afterward became chargeable to the town of Bethlehem, whose overseers of the poor expended money upon an order of maintenance for his support. Held, that B. was liable to the overseers, in an action for such money upon the statute, (secs. 40, c. 137, a. 7.) *Warren v. Brooks*, 7 Cow. 218.

Held also, that no notice to B. to maintain the pauper was necessary, previous to the expenditure. *Id.*

Held also, that no adjudication of two justices, as to the pauper's place of settlement, was necessary. But that the manumitting master is liable, upon the statute, to any town to which the slave may become a charge. *Id.*

The settlement of a slave follows that of his master. *Id.*

If he gain a settlement, in his own right, the town to which he becomes chargeable may elect to remove him to that place of settlement; or charge his former master. *Id.*

It is proper and necessary that an order of maintenance should be obtained, in order to charge the master. *Id.*

That a negro works for, and is claimed by one as a slave, is *prima facie* evidence that he is a slave. *Trumott v. Byers*, 5 Cow. 480.

An agreement by the owner of a negro slave, that the slave shall work for another during his life; provided that, if the vendee sell him within two years, he shall pay the vendor one-half the purchase money, is a sale of the slave; and though his term of slavery would be out in 1827, yet it passes all the interest of the owner. *Id.*

The owner of a slave who deserts his master and works for another, need not give notice of his claim to entitle himself to an action for the slave's services. *Id.*

Advances made to a slave while wrongfully in the service of another, are not, however necessary they were, a matter of set-off against the owner, in an action for his slave's services. *Id.*

A parol agreement with a slave to manumit him, is void. *Id.*

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An agreement by a master with his slave, that he may work out his freedom by working and paying £80, though the slave leave his service, and actually earn and pay a part of the money, and refuse to return on being ordered back by his master for default of paying the residus, does not amount to the manumission. *Smith v. Hoff*, 1 Cow. 127.

Such an agreement is conditional, and does not take effect till the whole consideration be paid. *Id.*

It seems, that such an agreement, though not in writing, is valid, and if performed, will work a manumission. *Id.*

The purpose of a written manumission, &c., is to avoid being answerable for the future support of the slave. *Id.*

Evidence that a negro being imprisoned in New York as a slave, claimed his freedom, and was liberated as a free man, by the police of the city, is not admissible against the master. *Id.*

Whether the declarations of a negro are evidence for the master to prove the negro his slave, in an action to recover his price of the purchaser? *Ib.*

It seems, they are. *Id.*

It seems, that at common law a slave could not contract matrimony; and his right to marry in this state depends upon the statute of February 17, 1809, (secs. 32, c. 44, s. 2; 5 W. 450; 2 R. L. 201.) Hence the child of a slave could not inherit at common law. *Jackson ex dem. People v. Lervey*, 5 Cow. 397.

At common law, a slave was not capable of taking lands either by descent or purchase. *Id.*

But by the resolutions and laws of this state, a slave might take lands granted to him for military services during the revolutionary war. *Id.*

The children of such a slave, though born of a slave, with whom he had contracted marriage, before the statute of February 17, 1809, (secs. 32, c. 44, s. 2; 5 W. 450; 2 R. L. 201;) may inherit. *Jackson ex dem. The People v. Elm*, 5 Cow. 314.

Marriages between parties, where one or both of them are slaves, are legal by the statute, (secs. 36, c. 88,) and the issue legitimate. And where the wife is a free woman, and the husband a slave, their condition is not changed by the marriage; but the children follow the condition of the mother as to their civil rights, and the mother has the control and custody of them during infancy, as if the father were dead. *Overseers of Marbletown v. Overseers of Kingston*, 20 J. R. 1.

If the owner of a slave, who executes a deed of manumission, does not deliver it to the slave, or to some person for his benefit, the manumission is not complete and the slave is not free. *Petry v. Christy*, 19 J. R. 53. *Matter of Nan Nickel*, 14 J. R. 324.

Where the owner of a slave promised to manumit the slave, his wife and child, on his procuring good notes for \$200 and giving his own note for \$75, and the slave accordingly procured and gave the notes to G., who approved of them, and executed a deed of manumission, and procured the usual certificate from the overseers of the poor, but refused to deliver the deed, and

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kept it with the other papers in his hands for more than two years, during which time he detained the man, his wife and child, as slaves; in an action against C., the maker of one of the notes, which was payable in five months; held, that the freedom of the slaves being the consideration on which the note was given, there was a failure of consideration, and that G. was not entitled to recover. *Id.*

The plaintiff who had married an executrix, who was a legatee of all the property of the testator, and which included slaves brought by him from Virginia, sold a slave belonging to the testator at the time of his death, and took a promissory note for the purchase money, which he applied to the payment of his own debt; held, that the sale was not made by the plaintiff in his character of executor, but in his own private right, as owner of property acquired by his marriage with a legatee, and was, therefore, contrary to the statute, and void; especially as the sale was not necessary to pay the debts of the testator, and there was evidence of its being a contrivance to evade the statute; and that no action could be maintained on the note. *Link v. Miller*, 17 J. R. 296.

The owner of a slave, by his will, dated the 15th January, 1813, declared as follows: "I manumit and give freedom to my negro woman Moll, and her daughter Nan, immediately after my decease." The testator afterward sold Nan as a slave to C., and died; held, that the sale of the slave by the testator was, *pro tanto*, a revocation of his will, and that N. was not entitled to her freedom, after his decease. *Matter of Nan Nickel*, 14 J. R. 324.

Where a slave ran away from his master, an inhabitant of Connecticut, and came to the city of New York, where he was found and sold by the master to a person, also an inhabitant of Connecticut, then in New York on business; held, that this was not such a sale of a slave brought into the state as rendered him free under the act. *Secs. 36, c. 88, s. 23. Skinner v. Fleet*, 14 J. R. 263.

Where two of three tenants in common of a slave manumit him, this is sufficient to entitle him to his freedom, especially where the third joint owner has for a long time suffered him to act as a freeman, without claiming him as a slave, and thus authorized the inference that he also had manumitted the slave. *Outfield v. Waring*, 14 J. R. 183.

Where a person brings a suit against another, it seems, that he cannot afterward claim the defendant as his slave. *Id.*

All presumptions ought to be made in favor of personal liberty. *Id.*

An action on the case lies for seducing and harboring the slave or servant of the plaintiff, notwithstanding the penalty given by the "act concerning slaves and servants," which is a cumulative remedy. *Sidmore v. Smith*, 13 J. R. 322.

Where a person, by his last will, manumitted his slave Maria, and gave "to Maria her daughter Chloe, during her natural life; held, that whether the words "during her natural life," applied to Maria or Chloe, and whether the children of Chloe, born during the time that Maria was entitled to her

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services, became free on the death of M. or not, they could not be claimed by the representatives of the testator. *Conditin v. Havens*, 12 J. R. 814.

If Maria had no legal representatives on her decease, the children of Chloe became free. *Id.*

It seems, that the words "during her natural life," are to be referred to the life of O. *Id.*

But if these were referred to M., the children of O., born in the lifetime of M., became her property, on the general principle that the temporary proprietor of an animal is entitled to its increase. *Id.*

Where L., who was the owner of a slave, during the revolutionary war left his family and property in this state, and went into Canada, where he resided until his death, and his son J. took the management of his property, and under an execution against the goods of J., the sheriff sold all the right and title of J. in the slave; held, that the property of the slave continued in L., (he having never been attained,) until his death, and that it then passed to his executors and administrators, so that J. had no property in him which could be sold under an execution. *Geleton v. Russell*, 11 J. R. 415.

Parol declarations, made more than twenty years ago, by the owner of a slave, that he purchased her to make her free, and that he meant her to be freed, were held to be a manumission of such slave. *Wells v. Lane*, 9 J. R. 144.

Whether, since the statute of the 8th of April, 1801, (secs. 24, c. 186,) a slave can be manumitted without some instrument in writing. *Id.* See 14 J. R. 324.

Where the overseers of the poor of the town of O. gave a certificate in writing, that "the bearer, J., the slave of H., was under the age of fifty years, and of sufficient ability to get his living;" at the bottom of which was written, "we do hereby manumit the same," and the whole signed by the overseers, but not by the executors of H., to whom the slave belonged; and the certificate was recorded in the office of the clerk of the town; held, that this certificate, registered at the request of H., was conclusive evidence to charge the town with the future maintenance of such slave, as a pauper. *Hopkins v. Fleet*, 9 J. R. 225.

Whether the slave was duly manumitted or not, as respected his former owner, was a question between the slave and such former owner, with which the town had no concern; but, it seems, that this was a manumission sufficient to conclude the owner. *Hopkins v. Fleet*, 9 J. R. 225.

A person who has been a slave, but who has obtained his freedom, is competent to prove facts which took place while he was a slave. *Gurney v. Davies*, 1 J. R. 503.

A., the owner of a slave in this state, went into Vermont to reclaim the slave, who had run away, and resided there as a freeman. A. having taken the slave, while he was in his possession B. took out an attachment against the slave for a debt, on which the slave was arrested by an officer, and forcibly taken out of the possession of his master, and imprisoned; A. brought an action of trespass against B., in this state, for taking away his slave;

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held, that under the law of the United States, A. had a right to reclaim the slave as a fugitive from service: and that, as the slave was incapable of contracting a debt, the attachment was illegal and void, and no justification to B., who was guilty of a trespass, for which an action would lie here. *Glen v. Hodges*, 9 J. R. 67.

A sale, under a *fiat facias*, of a slave brought into this state, is valid. *Cesar v. Peabody*, 11 J. R. 68.

But if the purchaser sell him again, such sale is contrary to the act, and void. *Id.*

A slave, aged twenty-five years, ran away from his master in another state, and came to this state, and his master followed him, and entered into an agreement with a person residing here, to let the slave to him for twenty years, for the consideration of \$225, giving him absolute authority over the slave; this was an importation and sale of the slave, within the act of the 22d of February, 1788. *Fish v. Fisher*, 2 J. C. 89.

So, where the services of a slave of eighteen years old were sold for twenty years, for a *bona fide* consideration, by an indenture, containing a clause of manumission at the expiration of that time; held, that this was an evasion of the act of 1788, and that it was a sale within the statute. *Link v. Beuner*, 3 Cai. R. 325.

A slave imported into this state after June, 1785, and sold after October, 1801, is within the protection of the act, 1788, and entitled to be free notwithstanding the law of 1788 is repealed by that of April, 1801; (an act to repeal the acts and parts of acts therein mentioned. Laws, vol. 1, p. 619, K. and R.,) he having acquired, under the statute of 1788, a right not to be sold, which right is preserved to him by the proviso in the repealing act of 1801. *Id.*

In an action, *qui tam*, on the 6th section of the act concerning slaves, (sec. 24, c. 188,) held, that the exception in the clause was matter of excuse to the defendant, and need not be negatived by the plaintiff in his declaration. *Hart v. Cleis*, 8 J. R. 41.

That part of the 6th section of the act which declares that "the slave exported, or attempted to be exported, shall be free," does not operate, unless the master or owner is concerned in the exportation; but in case of a stranger or third person, acting without the knowledge of the owner of the slave, the only penalty is the forfeiture of \$250. *Id.*

A certificate of manumission, given to a slave, to take effect on the death of the master, irrevocable, is valid. *In the case of Tom*, 5 J. R. 365.

And if the master, for a valuable consideration, during his lifetime, sells and delivers him to a third person, he will, notwithstanding, on the master's death, be entitled to his freedom. *Id.*

If the owner of a slave give a written promise to manumit him after a certain number of years, on condition of his faithful service during that period, it is a conditional manumission, obligatory on the master, and of which the slave may avail himself, on the performance of the condition. *Kettletus v. Fleet*, 7 J. R. 324.

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An agreement between A. and B., by which A. put to service to B., in this state, a slave owned by A., and whom he had brought into this state, to continue in such service until the parties, or their executors, should mutually agree to annul the agreement, is a sale within the act of 22d of February, 1788, prohibiting the sale of imported slaves. *Sable v. Hitchcock*, 2 J. C. 79. S. C., affirmed in error, Id. 488.*

But that act does not extend to persons acting in a representative capacity as executors, &c., and not as owners, or agents for the owner, so as to subject them to the penalty, and render the slave free. Id.

When a sum of money is paid in a neighboring state, to a master, upon the manumission of his slave, which slave immediately thereafter, and without knowing that she is free, binds herself by indenture to serve the person so paying for her, twelve years, and is thereupon brought into this state; this is an evasion of the statute prohibiting the importation of slaves. *Dubois v. Allen*, A. N. P. 94.

Previous to the statute of 8th April, 1801, s. 24, c. 188, a parol manumission was sufficient; but since the passing of that act, some certificate or instrument in writing is necessary. A. N. P. 39, n. a.

A manumission does not rest upon the principles of a contract depending on a consideration, but it is an act of benevolence, sanctioned by the statute, and made obligatory if in writing. Ib. N. Y. Dig., vol. 4, p. 1152, *et seq.*

GILBERT against FIELD.

In an action for words spoken of an attorney, the declaration must allege a *collegium* respecting his profession, or it will be fatal on a motion in arrest of judgment.[1] So, if two *gravamina* be stated, one of which affords us cause of action, and entire damages be given, judgment will be arrested. It does not seem to be actionable to say at the time of election of a candidate for a seat in the legislature, that he has been seen drunk and asleep in the assembly room, and is unfit to be a member.

CASE for words spoken of the plaintiff in his character of attorney, and member of the legislature.

[1] In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose. See Code, 1852, s. 164.

Gilbert v. Field.

The declaration, after the formal introductory matter of good fame, &c., without alleging any *colloquium* respecting the profession of the plaintiff, stated, with the proper *innuendoes*, (a) that the defendant had said "I have frequently seen him as drunk as a coot in the assembly of this state; in the assembly while a member thereof; that he was unfit for a member of the assembly, and if his character were known to the electors of the county of Columbia, they would not elect him to represent them in the assembly; for during the last session of the assembly, and while a member thereof, I have seen him a number [*330] of times come into the assembly room *and fall asleep therein. That he was unfit and unqualified to be a member of the assembly of the state in the legislature, for I have frequently seen him drunk, and unfit for any business."

Woodworth, for a variety of reasons, but principally for want of a *colloquium*, and because the words were not in themselves actionable, argued that the judgment must be arrested.

W. W. Van Ness, contra.

LIVINGSTON, J., delivered the opinion of the court. In arrest of judgment several objections are taken to the declaration, two of which, according to decided cases, are fatal.

That it should appear either from the words themselves, or from the pleadings, or be clearly intended, that at the time of publishing the words, there was a *colloquium* concerning the profession of the party of whom the slander is uttered, has been long and repeatedly settled. Nor is this

(a) An *innuendo* will not supply a *colloquium*, but if there be a *colloquium* sufficient to point the application of the words to the plaintiff, and they be spoken maliciously, judgment must be given for him. *Lindsey v. Smith*, 7 Johns. Rep. 359.

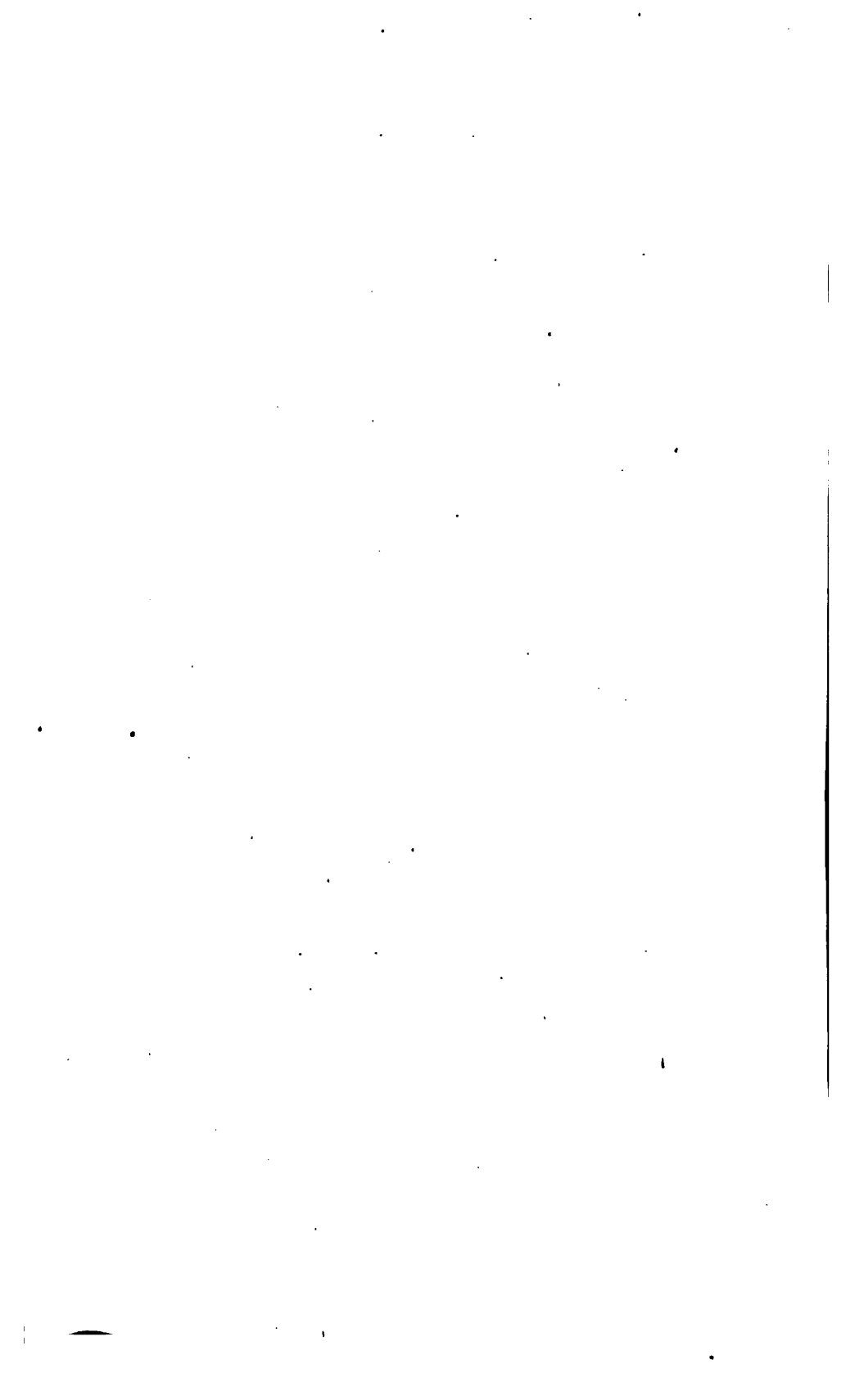
 Gilbert v. Field.

form of declaring, if it comport with the fact, more difficult to pursue than the one which has been adopted. If from the words here it may be inferred, or intended, as we think it may, that there was a discourse concerning the plaintiff's fitness for the office of member of the legislature, (a) the declaration is entirely silent as to any conversation about his professional character; and as his injury on this score forms a very essential part of the *gravamen*, and the damages are entire, a *colloquium* concerning his profession was absolutely necessary. [1] For this omission judgments have been arrested, or the plaintiff in other stages of a suit defeated of his remedy. The reason assigned for the rule is, that unless the words appear to be spoken concerning one's profession, office, or trade, he cannot lose or be discredited thereby. If this be thought by some not very satisfactory, it would be too much, without showing its palpable absurdity, to shake so many authorities by permitting a looser mode of declaring at this day. Judgment must, therefore, be arrested.

(a) According to the English decisions, defamatory words which are actionable in themselves, are not the less so because spoken of a person who is a candidate for a seat in parliament. *Harvey v. Astley*, 1 N. R. 47. See *Hopkins v. Beadle*, 1 Caines' Rep. 348.

[1] To maintain an action for words spoken, on the ground that they were injurious to the plaintiff in his business or occupation, the words must relate to his business character, and must impute to him misconduct in that character. *Ireland v. M'Garvish*, 1 Sandf. 155.

END OF NOVEMBER TERM.



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DAMAGES.

1. Wherever damages are given, costs follow by the statute, and therefore need not be found. *Brown v. Smith*, 84

2. If, in consequence of a breach of contract, in not transporting goods, they be taken by the proprietors and sent by another conveyance, in the course of which they are lost, damages cannot be recovered for their value as at the port of destination, nor will they be allowed for interest lost, in consequence of not being in cash at the time when they otherwise would have been sold. *Smith & Delamater v. Richardson*, 219

See ERROR, 1. PLEA and PLEADING, 4, 6. PRACTICE, 81, 93. SET-OFF, 1. WATERCOURSE, 1. WORDS, 2.

DEBT.

1. Debt will lie on a decree of a court of chancery in a sister state, if it be simply for the payment of a sum of money by the defendant, without any acts to be done by the plaintiff. And if the decree be for the payment of one gross sum to several persons, though their proportions be previously specified the action may be joint, and is the most appropriate form, *ut sensb. Post & La Rue v. Noyes*, 22

2. Under the "act for the inspection of flour and meal," on such only as is purchased, manufactured, or shipped for exportation, do the penalties attach, and if an inspector, without

being requested, inspect against the will of the proprietor, though every cask be deficient in weight and falsely tared, debt will not lie for the penalties unless it be averred, or appear, that the flour or meal was intended for exportation. *Ferris v. Coles*, 207

See STATUTES, 1.

DEBTORS.

See ARREST and ARRESTING DEBTORS

DECLARATION.

See COUNT. COVENANT, 2. DEMUR-
RER, 2. PLEA and PLEADINGS, 3,
4, 6. PRACTICE, 59, 81, 82, 89.
PROMISSORY NOTE, 8. VERDICT, 3.
WORDS, 1, 2.

DECREE IN CHANCERY.

See DEED, 1.

DEFAULT.

See PRACTICE, 12, 14, 16, 17, 18, 83,
49, 52, 53, 60, 85.

DEFENCE.

See PRACTICE, 14, 19, 22, 52.

DELAY.

See PRACTICE, 19.

DELIVERY.

See TRANSIT, 1.

DEMURRER.

1. If there be one good count, and a demurrer put in to the whole declaration, judgment will be for the plaintiff, though a special cause be assigned, which is applicable to only one of the counts. *Whitney v. Crosby*, 89

2. Where the declaration consists of two counts, one good, and the other bad, if to the latter be pleaded an insufficient bar, going to the whole cause of action, to which the plaintiff demurs, still he will be entitled to judgment on the count which is good. *Ward v. Sachrider*, 263

See FRIVOLOUS DEMURRER. PLEA and PLEADINGS.

DEMURRER TO EVIDENCE.

See PRACTICE, 62.

DEPOSITIONS.

See PRACTICE, 40.

DEVIATION.

See INSURANCE, 5.

DISCONTINUANCE.

See PRACTICE, 85.

E

EJECTMENT.

1. In ejectment, by a purchaser under a sheriff's sale, against the debtor, who refuses to give up the possession, the defendant cannot show title in another, for the plaintiff comes into exactly such estate as the debtor had, and if it was a tenancy, the plaintiff will be tenant also, and estopped in a suit by the landlord from disputing his right in the same manner as the original tenant, who becomes quasi tenant at will to the purchaser. *Jackson v. Graham*, 188

2. If an ejectment be brought under the statute of the 28th of March, 1797, within the five years thereby limited, and it abate by the death of the defendant, who dies after the five years have expired, whether another action, though instituted

directly after, can be maintained,
quare. Jackson v. Horton, 197

See **ATTAINDER**, 1. **COVENANT**, 1.
PRACTICE, 3, 52, 64, 67. **SHERIFF'S**
SALE, 1.

EMBARGO.

See **INSURANCE**, 8.

EQUITIES.

See **PARTNERSHIP**, 1.

ERROR.

1. If, under the law authorizing the arrest of ships, the residence of the owner be put in issue and found against him. it cannot be urged for error that the declaration did not aver the owner to be a non-resident, nor that the jury assessed damages beyond the amount of the bills annexed to the declaration, if the sum be within the damages laid; nor that costs be given; nor that the judgment is against the vessel "that she remain liable," &c., nor that the verdict is rendered upon issues taken to pleas put in by the owner, who had neither entered an appearance, nor filed bail. *Ship Nancy v. Filpatrick*, 88

See **JURISDICTION**, 2. **MISRECEIT**, 1.
PLEA and **PLEADING**, 4. **PRACTICE**, 35, 76, 78, 81, 85. **VERDICT**, 2, 3.

ESTOPPEL.

See **EJECTMENT**, 1.

EVIDENCE.

1. Parol evidence is not admissible to show from circumstances, that the sum expressed in a receipt of 25 years' standing, was continental money, and therefore amounted to less than the value expressed. A payment for which a receipt is given, to a person in his own name, is evidence of a payment on his own account, and that it was not made on account of a debt due from him and another, though there

do not appear any directions to apply it to the separate account, especially if such payment be for the exact amount of a balance due from himself, and would overpay the joint debt. *Robert v. Garnie*, 14

2. In an action charging the defendant with fraud from mere circumstances evidence of general character is admissible. *Ruan v. Perry*, 120.

See **BILL OF EXCHANGE**, 1. **INSURANCE**, 1, 2. **PRACTICE**, 90. **PROMISSORY NOTE**, 5.

EXCHANGE.

See **PRACTICE**, 74.

EXECUTION.

See **EJECTMENT**, 1. **PRACTICE**, 8, 20. **SHERIFF'S SALE**, 1. **TRESPASS**, 2, 4, 5.

EXECUTOR.

See **JURISDICTION**, 1.

EXCUSE.

See **PRACTICE**, 24.

F

FALSE IMPRISONMENT.

See **PRACTICE**, 20. **TRESPASS**, 4, 5.

FIERI FACIAS.

See **EXECUTION**.

FINE.

See **ACTION**, 1

FLOUR.

See **DEBT**, 2.

FORCEFUL ENTRY AND DETAINER.

See **TRESPASS**, 2.

FOREIGN JURY.

See **PRACTICE**, 25.

FRAUD

See **EVIDENCE**, 2. **INSURANCE**, 1, 4.
JURY and **JUDGES**, 1. **SHERRIFF'S SALE**, 1. **TRANSITU**, 1.

FREIGHT.

See **INSURANCE**, 2, 3.

FRIVOLOUS DEMURRER.

See **PRACTICE**, 19, 43.

FURTHER TIME.

See **PRACTICE**, 21.

G**GENERAL AVERAGE.**

See **INSURANCE**, 3.

GENERAL ISSUE.

See **PRACTICE**, 9, 23, 70, 89.

GOVERNMENT AGENT.

See **AGENT**, 1.

GRAIN.

See **INSURANCE**, 6.

GRAND ASSIZE.

See **PRACTICE**, 84.

GRANT.

See **CATSKILL PATENT**.

GUARDIAN.

See **ARBITRATION**, 2.

H**HUDSON'S RIVER.**

See **RIVERS**.

I**INDROFMENT.**

See **PRACTICE**, 26.

INDORSER, INDORSER, AND INDORSEMENT.

See **PROMISSORY NOTE**, 4, 5.

INFANT.

See **ARBITRATION**, 2. **PROMISSORY NOTE**, 6.

INFERENCE.

See **INTERDICT**.

INNS.

See **PRACTICE**, 59, 82.

INQUIRY.

See **WRIT OF INQUIRY**.

INQUEST AND INQUISITION.

1. If any one mix with a jury on a writ of inquiry, the inquisition will be set aside, each party paying his own costs. *Woods v. Hart*, 96

See **PRACTICE**, 19, 22.

INSOLVENT.

See PRACTICE, 22. PROMISSORY
NOTE, 1, 4.

INSOLVENT AND INSOLVENT
LAW.

1. A discharge under the insolvent law of another state is no bar to a suit here, by a citizen of this state, for a debt contracted within it, and who has not come in under the proceedings under the insolvent act. *Van Brough v. Van Arsdale*, 154

INSPECTION.

See DEED, 2.

INTENDMENT.

See PRACTICE, 28, 89. PRESUMPTION.

INTEREST.

1. Interest may be recovered beyond the penalty of a bond. But whether it shall be so, or not, is matter of law arising from the facts, and therefore for the determination of the court, not of the jury. Acknowledging a bond, and apologizing for not paying it, are circumstances to rebut and destroy the presumption arising from not paying interest for 25 years. *Smodes v. Hooghtaling*, 48
2. Interest may be recovered under a count for money had and received. *Pease v. Barber*, 268

See DAMAGES, 2. INSURANCE, 9, 10.
PROMISSORY NOTE, 2. PRACTICE, 7.

INSURANCE.

1. Under a count averring a loss by the barratry of the master, it is not incumbent on the assured, to prove that the master was not the owner. It must, if relied on as a defence, be shown by the underwriter; a fraudulent sale and purchase by the master of a vessel will

not constitute such an ownership, as to afford a defence to a claim for a loss by his barratry. A person contracting and dealing with a master who had purchased in his owner's vessel, in his capacity of master, may recover, under a count for barratry, a loss occasioned by the fraudulent conduct of such master. *Steinback v. Oyden*. 1

2. By a valued policy on freight "at and from" one port to another, and "at and from thence" back to the original port for which a premium is paid double to that which would be demanded for the outward voyage, the freight to the full amount of the valuation is covered on each voyage, and the insured, in case of capture on the return voyage, is entitled to recover the full amount of his policy; without making any deduction for the freight received on the outward risk. On a valued policy on freight, if there be an inchoate right to some, and the transaction *bona fide*, the value cannot be inquired into. If a shipowner insure his vessel and freight with two sets of underwriters, and on a capture abandon first to those on the vessel, and then those on the freight, after which he receives 50 per cent. of his claim on the underwriters on the vessel, and in payment of the other 50, takes an assignment of their rights in the vessel, he will be entitled to receive the freight which they would have been entitled to, and to recover in his own right from the insurers of the freight the full amount of his policy, deducting the *pro rata* freight earned previous to the abandonment in the voyage on which captured. *Davy v. Hallett*, 18

3. Under a policy on freight the gross amount is, on a total loss, the sum to be recovered. *Stevens v. The Columbian Insurance Company*, 43

4. If the information of the loss of a vessel be known in a place early in the morning of the day on which a policy is effected at noon, it is not proof of fraud in the underwritten, though it be brought by some of the crew of the ship insured, if it do not appear that they had been on shore. If it be doubtful whether

a communication as to the time of a vessel's sailing has been made, a new trial will be ordered to ascertain that fact, especially if from the amount of premium it may be inferred that it was not duly stated, but should circumstances render it difficult to establish on the second trial the facts proved on the first, the order for the second will be on condition of admitting those facts. *Livingston v. Delafield*, 49

5. If an assured be apprized by his master of his pursuing another voyage than that insured, on which he has been sent, and do not disapprove of it, it is only a deviation and not barratry, though the master ultimately run away with the ship, sell her, and embezzle the proceeds. *Thurston v. Columbian Insurance Company*, 89

6. If the articles contained in the memorandum in a policy respecting corn, &c., physically exist, the underwriter is not liable for a total loss on account of their being perfectly rotten. When the assured rests on a loss of voyage to warrant his recovery, he should show it most clearly, and of this a survey is always a proof of good faith. *Neilson and others v. The Columbian Insurance Company*, 203

7. Neither a want of averring interest, nor the words of the policy being, "policy to be proof of interest," are of themselves evidence of a wager policy. On a wager policy to entitle the assured to recover, the loss must be absolutely total; a technical total gives no right. *Olen-dining & Adams v. Church*, 141

8. The charterer of a ship at so much per month, cannot, on an insurance on his cargo, recover the extra sum paid during an embargo; such expenditure being the subject of a general average, and not covered by any words in the policy. *Penny & Scribner v. New York Insurance Co.*, 155

9. On a re-assurance no abandonment is necessary, though the primitive assured has abandoned to his insurer; and the re-assurer is liable to the assurer for all costs, &c., *bona fide* incurred in defending the suit

by the original underwritten, especially when, with notice of its going on, he stands by, and does not offer to settle; for, as the re-assurer is entitled to every defence against the insurer, which he may urge against the primitive assured, it becomes necessary for the original underwriter to show he has been obliged to pay on a just claim against him, and he will be entitled to interest on all he has expended and paid. *Hastie and Patrick v. De Peyster and Charlton*, 190

10. If a vessel be destined for a port which is suspected to be blockaded by the British, with directions to call at a particular place for the orders of the correspondent residing at the blockaded port, and to whom she is unqualifiedly addressed, it is not a breach of duty in him to order the vessel to his own port, and if she be taken going there, and condemned for being guilty of a breach of blockade, the correspondent, if he appear to have acted in good faith, will not be liable. On an open account current, interest is not allowable, unless by the custom of the trade, or private agreement. *Liotard and others v. Graves*, 228

11. Profits are insurable *eo nomine*. If profits only be insured, an abandonment is necessary when there has been no insurance on the cargo, and in such case it must be made early, that the insurer may elect either to pay his loss, or to pay that and the price of the goods, at first cost and charges; therefore, if the assured lie by, and take his goods and sell them, he cannot afterwards call on the underwriter for any loss on the profits. But, whether this rule will apply between different sets of underwriters on cargo and profits, *quære*. *Tom v. Smith*, 245

IRREGULARITY.

See INQUISTION, 1. PRACTICE, 18, 83. VERDICT, 1.

ISSUE.

See GENERAL ISSUE. JOINING IN ISSUE. PRACTICE, 15, 60, 81. VENUE, 2.

ISSUE RO. L.

See PRACTICE, 71.

J

JEOFAILS.

See PRACTICE, 71.

JOINING IN ISSUE.

See PRACTICE, 81.

JURISDICTION.

1. Confessing a judgment in a justice's court, will not give it jurisdiction in a suit by an executor. *Coffin v. Tracy*, 129

2. The court of chancery has exclusive jurisdiction over the question of costs accrued in that court. *Leonard v. Freeman*, 171

See ACTION, 1. MAYOR'S COURT, 1. PRACTICE, 81. TRESPASS, 3.

JOINT ACTION.

See DEBT, 1.

JUDGE'S CERTIFICATE.

See STAY OF PROCEEDINGS.

JUDGE'S ORDER.

See STAY OF PROCEEDINGS.

JUDGMENT.

See ARREST OF JUDGMENT. DEMURRER 1, 2. ERROR, 1. JURISDICTION, 1. PRACTICE, 1, 32, 33, 46, 61, 68, 75. SET-OFF, 2. VERDICT, 2.

JUDGMENT AS IN CASE OF NON-SUIT.

See PRACTICE, 15, 41, 42, 57, 65.

JURY AND JURORS.

1. It is for the jury to determine whether circumstances of general conduct show a fraudulent intent. *Ruan v. Perry*, 120

See FOREIGN JURY. INQUISITION, 1. INTEREST, 1. PRACTICE, 6, 30. PROMISSORY NOTE, 5. STRUCK JURY. VERDICT, 1.

JUSTICE AND JUSTICE'S COURT.

See ACTION, 1. CRETIONARI. JURISDICTION, 1, 2. PLEA and PLEADING, 6. PRACTICE, 9, 30, 35, 51, 68, 74, 76, 81, 82, 85, 89. VERDICT, 3.

JUSTIFICATION.

See PRACTICE, 89. WORDS, 1.

K

KAYADEROSSERAS PATENT.

1. Fort Miller falls are the third falls mentioned in the Kayaderosseras patent, and the map of the commissioners of that patent made in 1770 and 1771 not correct. *Brandt and others v. Ogden*, 6

N. B. Since the above decision, a second trial was in pursuance of it had, and by the most indisputable testimony, Baker's falls established as the third falls. See 1 Johnson, 156

L

LETTERS.

See PROMISSORY NOTE, 5.

LEVY.

See TRESPASS, 2.

LIEN.

See PRACTICE, 75.

LIMITATION.

See EJECTMENT, 2.

LIQUORS.

See PRACTICE, 59.

M**MANUCAPTION.**

See ANIMALS FREE NATURAL.

MASTER OF SHIP.

See INSURANCE, 1.

MAYOR'S COURT.

1. The mayor's court of the city of New York is a court of general jurisdiction, and therefore it is not requisite to allege that the cause of action arose within the limits of the city and county of New York. *Ship Nancy v. Fitzpatrick*, 38

MEAL.

See DEBT, 2.

MEMORANDUM IN A POLICY.

See INSURANCE, 6.

MERITS.

See PRACTICE, 12, 14, 17, 18, 60, 89.

MESNE PROFITS.

See COVENANT, 1.

MILITARY LANDS.

1. By the act of the 5th of April, 1803, the title to the military bounty

lands vested in the patentees at the time of their deaths respectively, though they died previous to the 27th of March, 1803. *Jackson v. Phelps*, 62

MILLS.

See WATERCOURSE, 1.

MISNOMER.

See PLEA and PLEADING, 6.

MISPRISION.

See PRACTICE, 5, 50.

MISRECITAL.

1. A misrecital of the title of a statute in a part which does not alter the sense, when its date is truly set forth, cannot be shown as error, nor after verdict alleged in arrest of judgment. *Ship Nancy v. Fitzpatrick*, 39

MISTAKE.

See PRACTICE, 12, 14, 49, 52, 53, 60.

MONEY HAD AND RECEIVED.

See INTEREST, 2.

MOTION.

See PRACTICE, 28, 61.

N**NEW TRIAL.**

See INSURANCE, 4, PRACTICE, 1, 30.
TRANSITU, 1.

NEGROES.

See SLAVES.

NEUTER.

See *TRESPASS*, 1.

NEW-YORK.

See *MAYOR'S COURT*, 1.

NISI PRIUS.

See *PRACTICE*, 22.

NISI PRIUS RECORD.

See *PRACTICE*, 71.

NONPROS.

See *PRACTICE*, 21, 35, 37.

NON-RESIDENCE.

See *PRACTICE*, 62.

NON-SUIT.

See *JUDGMENT AS IN CASE OF NON-SUIT*.

NOTICE.

See *PRACTICE* 9, 10, 12, 13, 14, 15, 24, 37, 38, 43, 46, 50, 55, 67, 69, 70, 72, 80.

NULLITY, OF TREATING A
PLEA AS SUCH.

See *PLEA and PLEADING*, 1.

NUNC PRO TUNC.

See *PRACTICE*, 11, 26.

OCCUPANCY

See *ANIMALS FERM NATURE*.

ORDER.

See *TRANSITU*, 1.

OWNER OF SHIP.

See *KRON*, 1. *INSURANCE*, 1.

P

PARTNERS AND PARTNERSHIP.

1. If several persons unite in an adventure, the profit of which is to be shared, and the loss borne according to their respective proportions, and the whole be received by a third person, under an express promise to pay the share of each according to the several interests, he cannot set up any equities which one may have against the other, or object that they were partners, but must pay according to his promise. *Dunn & Dickson v. Morris & Wisner*, 45

See *BILL OF EXCHANGE*, 1. *PRACTICE*, 24.

PAROL EVIDENCE.

See *EVIDENCE*, 1. *PRACTICE*, 30.

PARTITION.

See *PRACTICE*, 2.

PATENT AND CONSTRUCTION
OF PATENTS.

See *BAKER'S PATENT*. *CATSKILL PATENT*. *KAYADEROCHERAS PATENT*.

PAYMENT.

See *EVIDENCE*, 1.

PENALTY.

See *DEBT*, 2. *STATUTES*, 1. *VERDICT*, 3.

PLEA AND PLEADING.

1. In *assumpsit*, a plea that the promise was by the defendant and one

- of the plaintiffs jointly, and not by the defendants separately, must be pleaded in abatement; if it be pleaded in bar, the plaintiff may treat it as a nullity for want of the affidavit, and enter a default as for want of a plea. *Robinson & Hartshorne v. Fisher*, 99
2. A traverse may be taken to any number of facts, if the whole of those facts make only one point, necessary to a defence or claim; for a point in law is not confined to a single fact. *Strong & Udall v. Smith*, 160
3. A promissory note to A. B., C. D., E. F. & Co. though there be no other persons in the firm, cannot be declared on by them, with the addition of "and company," but their individual names must be stated, with the usual description of trading under the style of, &c. If otherwise, it is bad on general demurrer. *Bentley and others v. Smith and others*, 170
4. Alleging a fact, which is no offence, and for which damages do not appear to have been given, is not error, and only matter of aggravation. *Ely v. Van Buren*, 218
5. Where a name appears to be a foreign one, a variance of a letter, which, according to the pronunciation of that language, does not vary the sound, it is not a *misnomer*. *Petrie v. Woodworth*, 219
6. Declaring for damages "on account of not fulfilling a contract for a lot of land" in a certain place, is, before a justice, sufficiently certain. *Petrie v. Woodworth*, 219
- See COVENANT, 2. ERROR, 1. MAYOR'S COURT, 1. PRACTICE, 59, 74, 79, 81, 82. VERDICT, 2, 3. WORDS, 1.
- POSSESSION.
- See ANIMALS FERE NATURE. SHERIFF'S SALE, 1.
- PRACTICE.
1. If judgment has been entered before argument brought on, for want of an order to stay proceedings, and the judge refused to grant one, merely because he thought the case would be determined within the first four days of term, it will be no objection to awarding the new trial ordered. *Smith v. Cheatham*, 57
2. In partition, if there be no opposition to the motion, the notice and affidavit of service only, as in other cases, need be read. *Codd et ux. v. Harrison*, 82
3. Where the plaintiff and defendant claim under adjoining patents, the court cannot grant a rule ordering the lessors of the plaintiff to permit a survey to be taken of the boundary line, but if it appear necessary for the defence in the suit that it should be ascertained, they will allow a rule to stay proceedings till the lessor consent to a survey, or the judge at the circuit may postpone the cause on the same principle. *Jackson v. Murphy*, 82
4. In opposing a motion for a reference, it is sufficient if the affidavit state that the controversy will involve questions of law, as the party "is advised by his counsel, and verily believes" without setting forth what those questions are. *Low v. Hullett*, 82
5. A clerical misprision in a return to a *certiorari*, may be amended after joinder in error, when it appears to have been served to prevent the entry of a default, for want of being served with an order to stay proceedings, then applied for and expected, but it will be allowed only on paying costs of the assignment and resisting the application. *Moore v. Bacon*, 83
6. The court will not hear an application for an order to stay proceedings on a case made, unless recourse has previously and without success been had to a judge. *Bach v. Cole*, 83
7. That the government of the United States is interested in a cause, does not make it of importance enough to grant a struck jury. *Hartshorne and others v. Gelston*, 84

8. If the sheriff have a surplus in his hands arising from a sale on an execution, the court will order it to be paid over on a *fi. fa.* issued at the suit of another plaintiff. *Ball v. Ryers*. 84
9. The court will not order a justice to make a return contrary to what he has sworn to, though there appear a certificate from him impeaching the return, but will leave the party to his action. If a special notice amount to the general issue, it seems unnecessary to return it. The court will not *ut semb.* order a justice to return a special notice, which, if on the record, would not vary their judgment. *Keeler v. Adams*, 84
10. If a notice of trial for the sittings be for the right day of the month, it is good, though the day of the week mentioned be wrong. *Wolfe v. Horton*, 86
11. If, from a change of attorneys, a bail bond taken by a plaintiff deposited to arrest, be lost, the court will, after verdict, grant leave to file common bail *nunc pro tunc*. *Napier v. Whipple*, 88
12. If a notice of retainer of attorney be sworn to have been given on one side, and denied on the other, for want of which a default has been entered, it will, with the subsequent proceedings, be set aside on payment of costs, if accompanied with an affidavit of merits, and there is reason to think there has been some mistake. *Thompson and Adams v. Payne*, 88
13. If the service of notice be insufficient the court will deny the application, though unopposed. *Jackson v. Giles*, 88
14. Where there is an affidavit of notice of appearance, which is denied on the other side, a regular default, and subsequent proceedings will not be set aside on stating a "substantial defence" without showing merits, or a mistake. *Jackson v. Dockstader*, 93
15. The defendant is entitled to move for judgment as in case of non-suit, whenever there is, after issue joined, time to notice for the next circuit; but if he has obtained time to plead, and from the nature of his plea distant witnesses may be needed, on which point it is necessary that the plaintiff's attorney consult with his client, who lives at some distance, though a stipulation may be excused, costs of applying must be paid. *Brooks v. Hunt*, 94
16. If to set aside a default, &c., a defendant rely on the having forwarded notice of retainer, &c., to the agent of his attorney, and the plaintiff's attorney swear he never has received them, the court will not grant the application unless the agent swear the papers never came to hand. *Lansing v. Horner*, 95
17. A regular default will not be set aside on account of the ignorance of the defendant that it was necessary to employ an attorney, though there be merits. *Beckman v. Franker*, 95
18. If a rule to plead be given on the return day of the writ, but before it is returned, or bail entered, a default and all subsequent proceedings thereon will be set aside, as being before the defendant was in court. On a motion for irregularity, the want of merits is immaterial. *Howell v. Denniston*, 96
19. If delay appear to be the object of a defendant, of which the having filed a frivolous demurrer is a cause of suspicion, the court will not set aside an inquest taken, though the defendant swear the action is for more than is due; he ought to state "that he has a defence as advised by counsel." *Bruen v. Adams & Merrill*, 97
20. If an action of false imprisonment be brought for taking the plaintiff in execution on a *ca. sa* in which the costs are by mistake larger than those actually awarded, the court will give leave to amend the execution, and the papers on which the application is made, may be titled as in the suit for false imprisonment. *Hobbes v. Williams*, 98.
21. If all the defendants in a suit be not brought in, and those who are give a rule to declare, the plaintiff

- must either do so or obtain further time, to entitle to which from time to time, showing that he is proceeding to outlawry against those not found, is sufficient. But if he do neither the one nor the other, he will be liable to a *nonpross* by those brought in. *Shaw & Barker v. Colfax and others*, 98
22. On a *sci. fa.* to revive a judgment of twenty years' standing, if an inquest has been taken, because the defendant's counsel was not prepared to adduce his discharge, long ago obtained under an insolvent law, and the defendant himself, from remoteness of distance, and bodily infirmity, could not attend, the court, on being satisfied that the discharge was obtained, will set aside the inquest to let in a proof of the discharge, though the defendant be shown of sufficient ability to pay; for a court of law cannot notice the moral obligation to pay debts from which a debtor has been by law discharged, unless a new liability has been incurred; but this will be done only on payment of costs. A counsel at *nisi prius* must, if asked, answer whether his client has a defence or not. *Schenck & Ten Broeck v. Woolsey*, 100
23. The court will not permit the general issue to be withdrawn, to let in a plea in abatement delivered in time. *Anonymous*, 102
24. Forgetting the commencement of the term, if the excuse be *bona fide*, is sufficient for not noticing for the first day. If a counsel has a known partner, who transacts his business, an excuse arising from the personal conduct of the counsel may be availed of in a suit in which the partner's name only appears on the record. *Buyard v. Malcolm*, 102
25. A town's contributing to the expense of a suit, is a ground for moving for a foreign jury, and the court will easily be induced to grant it in Long Island causes, which involve a right of fishery. *Striker v. Turnbull and others*, 103
26. If a record of indictment be lost, the court will grant leave to file one *nunc pro tunc*. *The People v. Bardock and Case*, 104
27. Costs must in all cases be paid within 20 days. *Brooks v. Hunt*, 95
28. All objections to the bringing on a motion must be made before the grounds of it are entered into; if not, they will be considered as waived. The court will infer that what ought to be inserted in an affidavit, and does not appear, did not exist. *Roosevelt v. Dean*, 105
29. A commission to be executed out of this state, may be directed to persons within it. *Jackson v. Van Loon*, 105
30. The court will not grant a rule on a justice, ordering him to return the conduct of a jury. *Anonymous*, 106
31. A judge may at any time grant and vacate his own order to stay proceedings, though a rule for judgment be entered. If the order be granted on a case made, because the jury have allowed an improper item, and the judge declare this to have been his only reason, the court may, on such item being relinquished, vacate the order. *Radcliff and Davis v. Marine Insurance Company*, 106
32. Though the sum for which a verdict is rendered be due, the court will not, after a case made, and an order to stay proceedings, permit judgment to be entered up for the purpose of binding the lands of the defendant. *Bird, Savage and Bird v. Pierpoint*, 106
33. An irregularity not known is not waived by a subsequent step taken by the opposite party, who may enter a default on the former irregularity if done so soon as known. Though the rule is that an application to set aside a default comes too late, if the judgment on it be perfected, yet, on a strong case of merits, it may be done on payment of costs, if the irregularity be merely the want of filing a paper served. *Giles v. Caines*, 107

34. Affidavits or documents in support of a deponent's character which has been impeached, may be read, though copies have not been served; but if they only in a collateral way establish his character, by proving the truth of the ground of the motion, which has been contradicted, they are inadmissible. An affidavit by a third person, of facts in the knowledge of a party, on which the application is founded, cannot be read, as it ought to be by the party himself, and if unable to attend a commissioner, the commissioner ought to go to his house. *Clark v. Frost*, 126
35. If after joinder in error, it be discovered that the justice has neglected to make a return to the clerk, and he has quitted the state, the court cannot *nonpro* the writ, but will give leave to take out execution in the court below, and for the plaintiff here to discontinue without costs. *Raoney v. Orary*, 126
36. Where a judge cannot try a cause, or a circuit falls through, the costs abide the event of the suit. *Bred v. Bogardus*, 126
37. Affidavit of service by leaving at the house of an agent, should state his absence. *Holmes v. Williams*, 126
38. A notice signed by a counsel, "for" the attorney on record is good, if the attorney has absconded; but generally all notices, &c., must be in the name of the attorney in the suit. *Bogert v. Bancroft*, 127
39. The court will not indulge to the next non-enumerated day to prepare affidavits in opposition, unless the party asking the indulgence can allege some reason why he was not prepared. *Jackson v. Ferguson*, 121
40. Depositions before commissioners must be signed with their names of office. *Jackson v. Stiles*, 128
41. The affidavit to ground a motion for judgment as in case of non-suit, must show where the venue was laid. *Brooks v. Hunt*, 128
42. Neither judgment as in case of non-suit, nor costs, nor stipulation, where, from a general belief at a circuit that antecedent causes could not come on, a young issue got an unexpected chance of trial. *Jackson v. Valentine*, 128
43. To gain a priority on a motion for judgment upon a frivolous demurrer, the notice must state the frivolousness as the ground of application. *Kibbe and Titus v. Stoddard*, 129
44. A rule for reference at a circuit is void, and an award under it will be set aside of course, but, as being an act of the court, it will be without costs. *Williams v. Green*, 129
45. The rule respecting reducing agreements into writing, extends to parties in the suit, as well as to attorneys. *Shadwick v. Phillips*, 129
46. If an affidavit of service state that the party did serve his opponent with notice of bringing on the cause to argument, it is, without setting forth or producing the notice itself, sufficient to entitle to judgment, if the opposite side do not attend. *Fall and Smith v. Belknap*, 131
47. Though agreements be not in writing, yet if they be not on that account resisted, but admitted, the court will give effect to them. *Brandt v. Berrian*, 131
48. Affidavit of service stating it from information of a clerk, who had indorsed the papers served, and had quitted the state, is good. *Jackson v. Howd*, 131
49. Where an agreement entered into after notice of motion, does not reach the end of the application, it will not be construed to be waiver of it; and if from misapprehension it be so considered, and a default entered on expiration of an order to stay proceedings, subsequent to which the motion is made and obtained, the default, though regular, will be set aside on costs and terms. *Olney v. Bacon*, 132
50. Notice of bail imports notice of retainer as attorney. If the misprision in entitling a cause do not

- mislead, or be not such as is likely to do so, it will not prejudice. *Quick v. Merrill*, 133
51. The issuing of the warrant or summons in a justice's court, is the commencement of the suit. *Boyce v. Morgan*, 133
52. In ejectment, if the tenant swear to a good and substantial defence, the court will set aside on paying costs a regular default, entered in consequence of the tenant's mistake in imagining that the supreme court was held at the circuit. *Jackson v. Skiles*, 133
53. A regular default will be set aside on payment of costs, if the defendant, having supposed the suit in the common pleas, has retained an attorney to defend there. *Wilson v. Guthrie*, 134
54. Where a verdict has been rendered in this court for less than 250 dollars, and afterwards set aside, the ordering supreme court costs is discretionary; but though none be specified, if it be on payment of costs, and the party obtaining the rule serve a copy of a bill of costs of this court, with notice of taxation, and the party served do not attend, on which an *ex parte* taxation takes place, and supreme court costs are allowed and paid, it is a waiver of the right, if any, to insist on common pleas costs. *Hinckley v. Boardman*, 134
55. If a stipulation be given before motion made, to entitle to costs upon it, it should be entered, and a rule for judgment nisi taken out and served, with a certified copy of the bill of costs. *Westmore v. Russell*, 135
56. An affidavit for leave to amend a justice's return in matters of fact, should specify them, that the court may judge whether they are material. *Leonard v. Sunderlin*, 136
57. The affidavit to ground a motion for judgment as in case of non-suit ought to be by the attorney in the cause, and state that the cause was not brought to trial. *Jackson v. Woodworth*, 136
58. If the writ against bail be return-
- able so soon after service that the defendant cannot, from the distance at which his principal resides, surrender him in time, the court will enlarge the period. *Van Rensselaer v. Hopkins*, 136
59. A declaration for a penalty for selling liquor contrary to the "act to lay a duty on strong liquors, and for regulating inns and taverns," ought to state the town where, time when, quality and quantity of liquor, and negative the *proviso* in the 7th section. *Blasdel v. Hewitt*, g. t., 137
60. An evident mistake of the time when a writ is returnable, will, if merits be shown, excuse a default, a payment of costs, and pleading issuably. *Gardiner v. Crocker*, 139
61. In real actions, judgment must be obtained on motion in open court. *Van Driener v. Christie*, 139
62. The clerk cannot give up bonds filed for security for costs, in an action where a non-resident is plaintiff; the application must be to the court, and the affidavit on which it is founded should state the taxation of costs, the names of the surety, and the non-residence of the plaintiff. *Meiks v. Childs*, 139
63. The rule as to changing the venue by a defendant, on account of the residence of his witnesses, does not apply between the counties of Kings and New York. *Mumford v. Cammann*, 139
64. On application for an attachment for costs on a non-suit, for not confessing lease, &c. the affidavit must show that there was an authority to demand them given by the lessor. *Jackson v. Siles*, 140
65. A notice for judgment as in case of non-suit, is not waived by a notice for a commission. *Brandt v. Burrows*, 140
66. Notice of motion to set aside proceedings against the casual ejector, and admit the tenant to defend, is not bad because signed "attorney for the tenant." *Jackson v. Skiles*, 140

68. A demurrer to evidence is not a proceeding applicable to the ten pound act, and a justice may therefore overrule it though there be no joinder in demurrer nor judgment prayed for. If a justice undertakes to set out the oath he administered to a constable, and it vary from that prescribed, it is fatal, though he states that he "duly" administered it. *Reynolds v. Bedford*, 140
69. Notice to appoint a new attorney need not be by a rule of court, and 30 days are sufficient, but it must be personal, or tantamount. *Givens v. Driggs*, 250
70. No notice of special matter is good, unless under the general issue. *Beadle v. Hopkins*, 250
71. The *nisi prius* record is always amendable by the issue roll on payment of costs. Awarding a *venire* to the proper officer on an insufficient suggestion is, after verdict, cured by the statute of *jofofalls*. *Tucker v. Wilson*, 251
72. Where both sides have a right to notice a case for argument and neither party brings it on, though called, the judge's order to stay proceedings continues good over the term. *Jackson v. Brownell*, 151
73. On an intended motion to set aside a report of referees, a judge's order expires with the term. *Anonymous*, 252
74. If a plaintiff in a justice's court allege that he "let" the defendant have a horse, in consideration of which the defendant "let" him have another, it shows, with sufficient certainty, an exchange and not a bailment. If a former trial be pleaded in bar in a justice's court, and the plea state the trial so that it appear it could not, according to technical rules, have embraced the bar, the matter so stated will be rejected as surplusage; and if the justice seem to have pronounced on that which is thus rejected to support the plea, the judgment will be reversed. A set-off allowed, though improperly, in a former suit before a justice, as a good plea in bar in another for damages on the ground of the set-off, though if the excep-
- tion be originally against the set-off, it may be urged, as in this court. *King v. Fuller*, 152
75. If a defendant has *bona fide* paid debt and costs to a plaintiff, the court will order satisfaction to be entered on the judgment obtained in the suit, though the costs of the plaintiff's attorney may not have been paid, for he has no lien on the debt while in the defendant's hands, unless he give notice not to pay over, or there be collusion. *Pindar v. Morris*, 165
76. Adjourning a justice's court for more than six days, cannot be alleged for error by him who has requested it. *Peck v. McAlpine*, 166
77. This court will not proceed in a case where there is not a *lis pendens* here. *Bradt v. Cray*, 170
78. If on the return day of the summons the defendant plead, and the justice, without his consent, adjourn on the prayer of the plaintiff for more than six days, it is a fatal error on a *certiorari* sued out by the defendant. *Calden v. Dopkin*, 171
79. Continuances are from term to term; therefore, a matter arising between a term and a circuit may be pleaded at the circuit as a *plea puis darrein continuance* at any time before verdict rendered, and the judge at *nisi prius* is bound to receive it, such plea being a matter of right. *Brooms v. Beardsley*, 172
80. If a party serving a notice has not kept a copy, he may prove its contents by parol evidence. *Tucker v. Wilson*, 174
81. Though the sums in the several counts before a justice exceed 25 dollars, yet if no one count be for more, and the damages be laid at only 25 dollars, it is within the jurisdiction of the ten pound court. If it appear on the whole of the record that the cause before a justice has been fairly tried, the judgment will not be reversed for want of joining in issue, or any technical error in the pleadings. *Stillson v. Sandford*, 174

82. If a plaintiff before a justice declare generally against a defendant, that he was "indebted," and then deliver a book account to the justice, that account will be taken as a part of the declaration, and if it appear on the return to have been for tavern expenses, the plaintiff ought to show that the defendant was within some of the exceptions in the 13th section of the tavern act; *aliter* if the plaintiff do not show that the demand was for tavern expenses; for then the defendant must bring himself within them. On *certiorari* error books may be delivered to the judges, but they will not be allowed for on taxation. *Ebel v. Smith*, 188
83. If an affidavit begin with a defendant's name, it is a good signing. *Half v. Spicer and Potter*, 190
84. If an elector returned on the grand assize leave the state, the court will grant a rule to add another to the panel. *Houghtalling v. Brook*, 190
85. It is error in a justice to award a venire on a default, or where a defendant does not plead. *Mannix v. Bobie*, 219
86. If an attorney withhold the money of his client, this court will afford relief in a summary way, without driving the client to an action. *The People v. Smith*, 221
87. On an original suit in this court, the plaintiff may declare at any time, unless *nonprossed*. *Obedham v. Lewis*, 256
88. Under the act respecting absent and absconding debtors, this court will inquire into the foundation of the demand of the plaintiff, and if it appear not to be such as to warrant an attachment, will order a *supersedeas*. *Lenox and others v. Russell and others*, 257
89. Special pleading in a justice's court is to be discountenanced. If in trover before a justice, a justification be pleaded, which goes to the merits, and he determine that it amounts to the general issue, whereon a trial is had, in which it does not, from the record, appear that the whole merits were not before the jury, the court will intend that they were, and affirm the judgment pronounced on the verdict rendered. All objections to a venire issued by a justice ought to be made before trial. *Kline v. Husted*, 275
90. No new trial will be allowed on account of newly discovered testimony, if it appear that it might have been procured on the first trial. *Palmer and others v. Mulligan and others*, 307
91. On the death of a witness to be examined on a commission, the court will not permit a new name to be inserted, though they may allow a new commission at the peril of the party. *McVicker v. Wolcott*, 321
92. To warrant proceedings against bail, there need not be eight days between the *teste* and return of the ca. sa. against the principal; it is enough if it have been four days in the sheriff's office. *Cook and others v. Campbell and others*, 322
93. For all demands arising *ex contractu*, though the amount be unliquidated, an attachment may be issued against the property of the absconding and absent debtors, under the act granting relief against them. *Lenox and others v. Howland and Lorraine*, 323
- See CERTIORARI, 1. CONSIDERATION, 1. DAMAGES, 1. DEBT, 1. DEMURRER. ERROR, 1. INQUIRY. INSURANCE, 4. MAYOR'S COURT, 1. PLEA and PLEADING. SET-OFF, 1, 2. VENUE. VERDICT, 1.
- PRIORITY OF MOTION.
- See PRACTICE, 43.
- PRESUMPTION.
- See INFERENCE. INTEREST, 1.
- PROOF.
- See CONSIDERATION, 1.
- PROFIT.
- See INSURANCE, 11.
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PROMISE.

See BILL OF EXCHANGE, 1. PARTNERSHIP, 1. PROMISSORY NOTE, 4.

PROMISSORY NOTE.

1. The release of one of two joint makers of a promissory note, under the act giving relief in cases of insolvency, is no discharge of the other. *Tucker v. Bennett and Brewster*, 4
2. When a note demandable immediately is on interest from any given month, without particularizing the year, it means the month of that name antecedent to the date of the note. *Whitney v. Crosby*, 89
3. A promissory note without words of negotiability, may, in an action by the payee against the maker, be declared on as a note within the statute. *Dawson v. Backenstee*, 137
4. An action will not lie on a note given, with a blank for the date, on consideration of signing an insolvent's discharge, and to be filled up after his exoneration, though subsequent to its being so filled up, the maker promises to pay it, and have a sufficiency in number and value, without the payee, such note being void in its creation, and not being capable of being set up by a subsequent promise. A note indorsed to a third person in trust for the benefit of some relative of the indorser's is, on an action by the indorsee, open to the same objections as if the suit had been by the indorser. *Payne v. Eden*, 213
5. In an action by a *bona fide* holder of a note, taken before due, against the maker, the consideration cannot be inquired into, if the instrument be not void in its creation. The letters of an indorser may be adduced to contradict his testimony as to the time of his indorsing, and it is for the jury to determine, whether his oath or letters are to be credited. *Baker and Rowson v. Richard and Henry Arnold*, 279
6. The note of an infant given in the course of trade, cannot be enforced

against him by the payee. *Van Winkle v. Ketcham*, 328

See ARRESTATION, 1. PLEA AND PLEADING, 3.

PROVISO.

See PRACTICE, 59.

PURSUIT.

See ANIMALS FERE NATURE.

PURCHASE.

See INSURANCE, 1. TRANSIT, 1.

QUIS DAREM CONTINUANCE.

See PRACTICE, 78.

PUBLIC RIVERS.

See RIVERS.

Q

QUI TAM ACTION.

See PRACTICE, 59.

R

REAL ACTIONS.

See PRACTICE, 61, 84.

RE-ASSURANCE.

See INSURANCE, 9.

RECEIPT.

See EVIDENCE, 1.

RECTAL.

See MISCELLANEOUS PRACTICE, 66.

RECORD.

See CERTIORARI, 1. NEW PRIUS RE-
CORD. PRACTICE, 24, 26, 71.

RECOVERY IN VALUE.

See COVENANT, 1.

REFERENCE.

See PRACTICE, 4, 44, 73.

RELATION.

See TRESPASS, 3.

RELEASE.

See PROMISSORY NOTE, 1.

REPORT.

See PRACTICE, 73. REFERENCE.

REPRESENTATION.

See INSURANCE, 4.

RE-RESTITUTION.

See TRESPASS, 3.

RESIDENCE.

See ERROR, 1. NON-RESIDENCE.
PRACTICE, 63, VENUE, 1, 2.

RESTITUTION.

See TRESPASS, 3.

RETAINER OF ATTORNEY.

See PRACTICE, 12, 16, 50.

RETURN.

See PRACTICE, 5, 9, 30, 35, 56, 63.

RETURN OF WRIT.

See PRACTICE, 13, 32.

RIGHT.

See WRIT OF RIGHT.

RIVERS.

1. The Hudson is a public river above
tide water, *ut semble. Palmer and
others v. Mulligan,* 307

See WATERCOURSE.

ROLL.

See ISSUE ROLL.

RULE TO DECLARE.

See PRACTICE, 21.

RULE TO PLEAD.

See PRACTICE, 13.

S

SATISFACTION.

See PRACTICE, 75.

SALE.

See INSURANCE, 1. SLAVES, 1.
TRANSIT, 1.

SCIRE FACIAS.

See PRACTICE, 22.

SECURITY FOR COSTS.

See PRACTICE, 62.

SERVICE.

See PRACTICE, 13, 37, 46, 48.

SET-OFF.

1. In a special action on the case for damages, a notice of set-off cannot be given. *Keeler v. Adams*, 82
2. Judgment in the common pleas may be set off against those in this court. *Schemerhorn v. Schemerhorn*, 190

See PARTNERSHIP, 1. PRACTICE, 74.

SISTER STATES.

See DEBT, 1. INSOLVENT and INSOLVENT LAW, 1.

SHERIFF.

See PRACTICE, 8. TRESPASS, 2.

SHERIFF'S SALE.

1. A sheriff's sale under a *f. fa.* is not void, because on a judgment confessed on a bond given by a man otherwise in debt, and the obligee declare he means to favor the obligor and his family, one of whom is accepted as the purchaser under the execution without paying the sheriff the consideration money, and the family of the obligor continue in possession as before. *Aliter*, if it appear that the bond was not for an actual debt. *Jackson v. Brownell*, 222

See EJECTMENT, 1.

SHIP.

See ARREST OF SHIPS. MASTER OF SHIP. OWNER OF SHIP. PROCEEDINGS AGAINST SHIPS.

SHIP OWNERS.

See OWNER OF SHIP.

SLAVES.

1. A sale of the services of a slave is the same as a sale of a slave. A slave imported into this state, after June, 1785, and sold after October,

1801, is within the protection of the act of 1788, and entitled to be free, notwithstanding the law of 1788 is repealed by that of April, 1801, he having acquired, under the statute of 1788, a right not to be sold, which right is preserved to him by the proviso in the repealing act of 1801. *Link v. Breuner*, 325

SPECIAL MATTER.

See PRACTICE, 70.

STATUTES.

1. If, in a statute, a clause creating a new offence, and inflicting a penalty to be so defectively worded, that by one part it appears to be recoverable in a summary way, and by another according to the usual course of proceeding, the latter shall be preferred. Therefore, debt in such cases will lie. All statutes giving summary modes of recovery are to be strictly construed. *Bennett v. Ward*, 259

See MISRECEIT, 1.

STAY OF PROCEEDINGS.

See PRACTICE, 1, 3, 6, 31, 72, 73.

STIPULATION.

See PRACTICE, 15, 42, 55.

STRUCK JURY.

See PRACTICE, 7. VENUE, 3.

SUBMISSION.

See ARBITRATION, 1, 2.

SUGGESTION.

See PRACTICE, 71.

SUMMARY PROCEEDINGS.

See PRACTICE, 86. STATUTES, 1.

SUMMONS.

See PRACTICE, 51.

SUPERSEDEAS.

See PRACTICE, 52.

SURPLUSAGE.

See PRACTICE, 74.

SURRENDER.

See PRACTICE, 53.

SURVEY.

See INSURANCE, 6. PRACTICE, 3.

T

TAVERNS.

See PRACTICE, 59, 62.

TESTE OF WRIT.

See PRACTICE, 92.

TITLING CAUSES.

See PRACTICE, 20, 50.

TRANSITU.

1. If a vendor deliver to his vendee, for goods lying in a public store, a bill of parcels, together with an order on the storekeeper for their delivery, the vendor's right of stopping in transitu is gone against a third person, purchasing bona fide for a valuable consideration, and though there be some suspicious circumstances attending the transaction, yet if they have been fairly submitted to a jury, the court will not intend there was any fraud so as to warrant a new trial. *Holmgsworth v. Napier*, 162

TRAVERSE.

See PLEA and PLEADINGS, 2.

TRESPASS.

1. Trespass will not lie against a naval officer for bringing out of her course a neutral vessel, if it be done in pursuance of instructions from the secretary of the navy, although, in consequence of being so taken out of her course, she be captured by another nation and condemned as prize, unless there appear to be collusion between the captors and the defendant. *Ruan v. Perry*, 120
2. In an action against a sheriff for levying on wrong property, to warrant a certificate that the trespass was wilful and malicious, it must appear, either that the execution was served by him, or with his knowledge; for a constructive trespass does not make it voluntary. *Tower v. Wilson*, 174
3. Trespass will not lie against a third person, acting under a license from one who was in possession under a writ of restitution awarded on conviction for a forcible entry and detainer, by a court having jurisdiction, though the indictment be afterwards quashed, and re-restitution directed; for a man cannot be a trespasser by relation. *Case v. De Goes and others*, 261
4. If a defendant be liberated from confinement, for want of being charged in execution, trespass will not lie against the plaintiff and his attorney for imprisoning him a second time on a ca. sa. issued on the old judgment in the suit from whence he was discharged, the process being only voidable. *Reynolds v. Corp and Douglas*, 267
5. A fortiori if such defendant obtain his discharge from execution under the insolvent act, his proceeding under that law being a confirmation of the execution, and a waiver of the error, if any. *Reynolds v. Church and Douglas*, 274

TRIAL

See PRACTICE 81.

TRUST

See PROMISSORY NOTE, 4.



VALUE RECEIVED.

See CONSIDERATION, 1.

VALUED POLICY.

See INSURANCE, 2.

VARIANCE.

See PRACTICE, 68.

VENIRE.

See PRACTICE, 71, 85, 89.

VENUE.

1. The residence of witnesses is a good cause for changing the venue, unless the plaintiff show he reside where it is laid. *Du Boys v. Henry Frank*, 95
2. After issue joined the defendant may move to change the venue, when all his witnesses reside in the county to which it is to be changed. *Delavan v. Baldwin*, 104
3. The court will not change the venue in a turnpike cause, on an affidavit, stating the dispositions of the county to be unfavorable to turnpikes, though it may be a good reason for applying for a struck jury. *New Windsor Turnpike v. Wilson*, 127

See PRACTICE, 41, 63.

VERDICT.

1. If, to ascertain the quantum of damages, a jury agree that each set down such sum as he thinks fit, divide the aggregate by twelve, and the quotient be the verdict, it is an irregularity for which it will be set aside. The confessions of jurymen as to their own misbehavior may be heard in applying to set aside a verdict, *ut semb. Smith v. Chestham*, 57
2. On a verdict for one mill, no judgment can be rendered, and if it be entered for the costs only, is in error. *Brown v. Smith*, 81
3. After verdict in a justice's court in an action for a penalty, it will be intended that the offence proved was such as warranted the penalty declared for, and, therefore, all want of form in the declaration cured. In such a suit, if only a portion of the penalty be demanded, it will, after verdict, be intended the residue was waived, and the defendant below cannot assign as error that less was recovered than might have been sued for. *Ely v. Van Buren*, 218

See MISDEBTAL, 1. PRACTICE, 54, 55.

VOID AND VOIDABLE PROCESS.

See TRESPASS, 4.

W

WAGER POLICY.

See INSURANCE, 7.

WAIVER.

See PRACTICE, 28, 49, 54, 65. TRESPASS, 5. VERDICT, 3.

WARD.

See ARBITRATION, 2.

WARRANT.

See PRACTICE, 51.

WATERCOURSE.

1. An action will not lie for diverting the water of a river from its usual course, by erecting a dam for mills above the mills of another, if sufficient water be left to work the lower mills, though, in consequence of such erection, it be necessary to run the mill dam of the lower mills further into the stream, and the difficulty of getting logs to the lower mills be increased so as to require one hand more for every twenty-five logs. Where persons have equal right to erect mill-dams on a river, the rubbish which comes from a newly erected upper dam to an old lower dam, though it be an inconvenience to the lower of about 250 dollars a year, will, if a jury have found in favor of the defendant, and it appear that the floating rubbish be lessened by the erection of the upper dam, be *damnum abque injuria*. *Palmer and others v. Mulligan*, 307

WILD BEASTS.

See ANIMALS FROM NATURE.

WITNESSES.

See PRACTICE, 63. VENUE, 1, 2.

WORDS.

1. If a man say of another, "you swore to a lie, for which you now

stand indicted," it is actionable. If the count in an action for words be insufficient, and the declaration do not contain any introductory matter or *colloquium* by reference to which they can be rendered so, the inadequacy of the count cannot be made good by a bar justifying and confessing of the words. *Pelton v. Ward*, 75

2. In an action for words spoken of an attorney, the declaration must allege a *colloquium* respecting his profession, or it will be fatal on a motion in arrest of judgment. So if two *gravamina* be stated, one of which affords no cause of action, and entire damages be given, judgment will be arrested. It does not seem to be actionable to say at the time of election of a candidate for a seat in the legislature, that he has been seen drunk and asleep in the assembly room, and is unfit to be a member. *Gilbert v. Field*, 319

See ARBITRATION, 1.

WRIT.

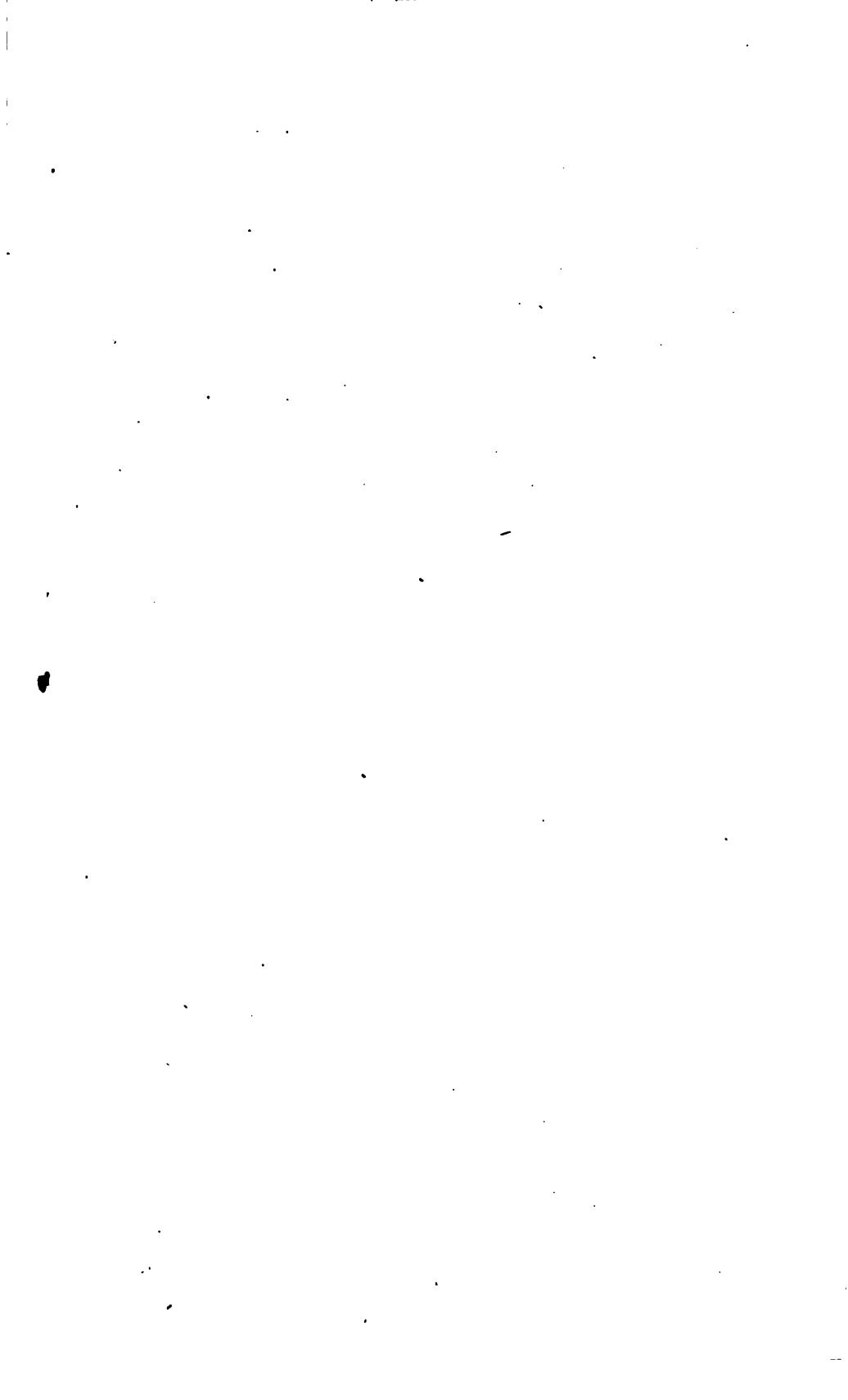
See RETURN OF WRIT.

WRIT OF INQUIRY.

See INQUIRY, 1.

WRIT OF RIGHT.

See PRACTICE, 84.

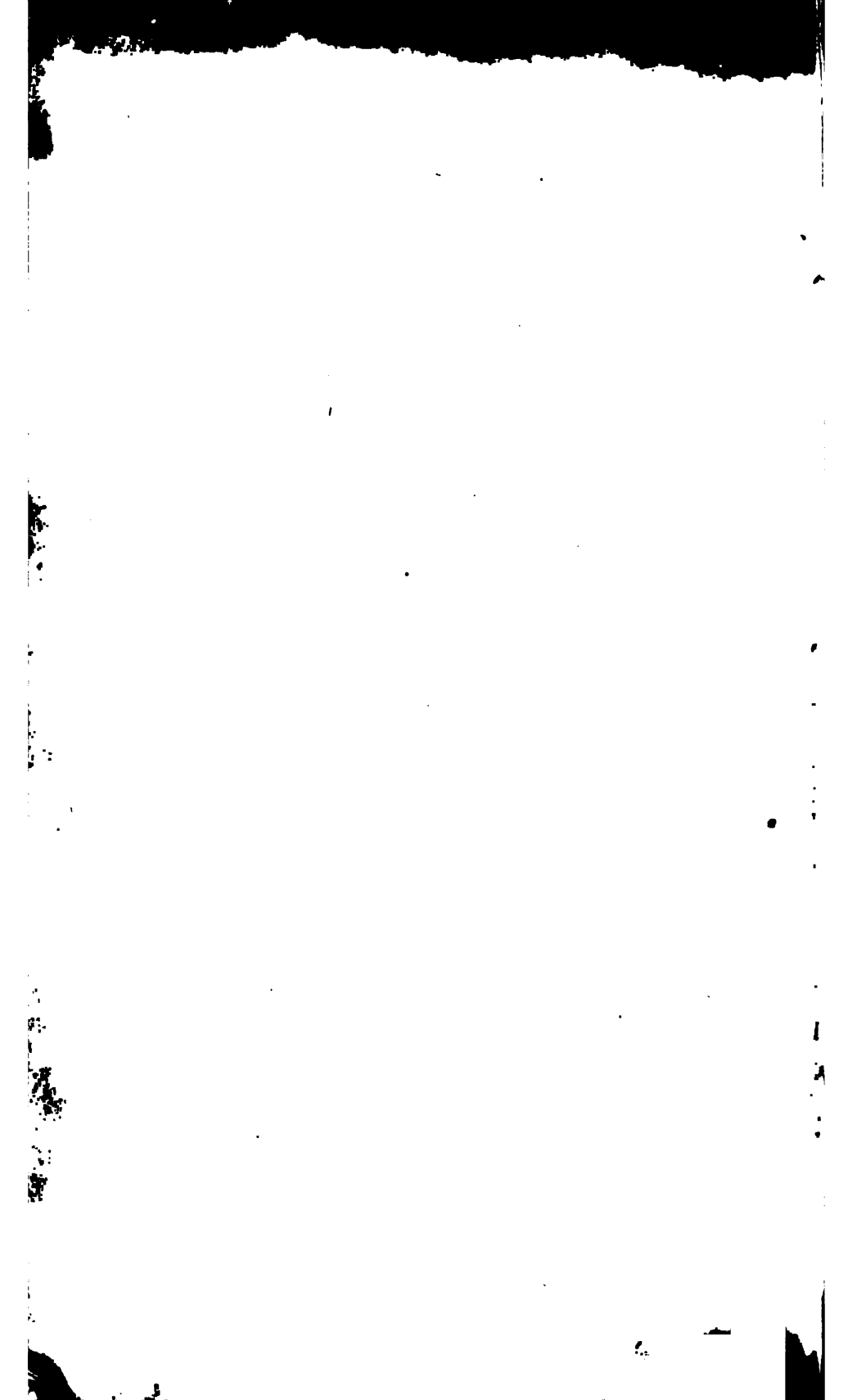












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